Supreme Court, U.S.
FILED

93 1652 APR 20 1994

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No. 93 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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QUESTIONS PRESENTED

1. Did a two judge majority of the Ninth Circuit panel improperly set aside a state court death sentence based on a finding of error in a penalty phase jury instruction regarding California's commutation procedures, where the instruction given was more favorable to the defendant than the one approved by this Court as constitutional in California v. Ramos, 463 U.S. 992?

2. Can a federal court set aside a state court death sentence based on a purported instructional error in the penalty phase without applying the reasonable likelihood test of Boyde v. California, 494 U.S. 370, or the harmless error test of Brecht v. Abrahamson, 507 U.S. ___ 123 L. Ed. 2d 353; 113 S. Ct. 1710?

3. Does a federal court create a new rule of law within the meaning of

Teague v. Lane, 489 U.S. 288, when it finds reversible error in a penalty phase instruction on commutation which is more favorable to the defendant than the commutation instruction which this Court expressly found constitutional in California v. Ramos, 463 U.S. 992?

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Petitioners respectfully petition for a writ of certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit reversing the judgment of death in this case.

OPINIONS BELOW

On February 3, 1994, the Ninth Circuit, in a 2-1 decision (Justice Trott

dissenting) issued an opinion reversing the death penalty of Bernard Lee Hamilton on the basis that the modified instruction on commutation violated his due process and Eighth Amendment rights. Hamilton v. Vasquez, ___ F.3d ___, 94 Daily Journal D.A.R. 3684; Appendix A.

JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a), and 2254, of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendments Eight and Fourteen.

STATEMENT OF THE CASE

A. Facts of the Crime.

On the evening of May 20, 1979, 24-year-old Eleanore Buchanan had dinner with her husband and two infant sons, and then left for her college math class in

their new van. Her body was found the next morning near Pine Valley, California. Mrs. Buchanan's head and hands were severed from her body and have never been found. Hamilton was arrested in Oklahoma on June 8, 1979, while driving the victim's van. People v. Hamilton, 41 Cal.3d 408, 413-419, 221 Cal. Rptr. 902, 710 P.2d 981 (1985) ("Hamilton I"); People v. Hamilton, 45 Cal.3d 351, 356, 247 Cal.Rptr. 31 753 P.2d 1109 (1988) ("Hamilton II").

A. Procedural Background

1. Direct Appeal

A jury convicted Hamilton of the 1979 murder of Eleanore Buchanan during the course of robbery, kidnapping and burglary, and he was sentenced to death on March 2, 1981. The California Supreme Court set aside the special circumstance finding and reversed the penalty of death after a majority of the court concluded

that it was possible Hamilton did not intend to kill Mrs. Buchanan. Hamilton I, 41 Cal.3d 408.

This Court granted California's petition for writ of certiorari, and remanded the case to the California Supreme Court in light of Rose v. Clark, 478 U.S. 570 (1986). California v. Hamilton, 476 U.S. 1301 (1986).

The California Supreme Court affirmed Hamilton's conviction and sentence of death. Hamilton II, 45 Cal.3d 351. The penalty phase commutation instruction was found erroneous under state law despite its lack of federal infirmity but the California Supreme Court held the error harmless in Hamilton's case because the jury had been instructed "not to make any use of the commutation instruction in determining the penalty to be imposed on a defendant." Hamilton II, 45 Cal. 3d at 375.

On January 23, 1989, this Court denied Hamilton's petition for writ of certiorari. Hamilton v. California, 488 U.S. 1047 (1989).

2. Collateral Review

The California Supreme Court has denied seven petitions for writ of habeas corpus collaterally attacking Hamilton's conviction and sentence of death.

The federal district court has denied five petitions for writ of habeas corpus collaterally attacking Hamilton's conviction and sentence of death. Hamilton's first federal petition for writ of habeas corpus was filed in the United States District Court for the Southern District of California (hereinafter "district court") on April 2, 1986. Hamilton v. Vasquez, Case No. 86-0809-T. Hamilton raised claims of ineffective assistance of counsel and denial of the right of self-representation. The

petition was denied on the merits on September 4, 1986. On September 24, 1987, the Ninth Circuit Court of Appeals vacated the judgment as premature based on Hamilton's failure to exhaust state court remedies. On September 30, 1987, the petition was dismissed without prejudice to refiling the petition following exhaustion. The issues in the petition were subsequently raised in a third petition filed in the district court. Appendix B at 111-113.

A second petition was filed in the district court on October 9, 1986. Hamilton v. Vasquez, Case No. 86-2101-B. Hamilton claimed that shackling him during trial violated his constitutional rights. The petition was denied by the district court on the merits on November 19, 1987. Following an appeal to the Ninth Circuit, the case was remanded on August 23, 1989, with directions to the district court to

review and consider the entire state court record and take more evidence, if appropriate, before ruling on the petition. Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989). The claims in the second petition were subsequently consolidated with Hamilton's fifth federal habeas petition. Appendix B at 112-113.

A third petition which raised the same claims contained in Hamilton's first federal petition was filed in the district court on September 30, 1987. The petition was dismissed by the district court on August 31, 1988. See Appendix B, at 113. Hamilton's subsequent appeal to the Ninth Circuit was also dismissed on September 7, 1990, as moot in light of the Ninth Circuit ruling in Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989) which remanded Hamilton's second federal petition to the district court for further proceedings. Appendix B at 113.

A fourth petition was filed on June 20, 1989, in the United States District Court for the Northern District of California claiming ineffective assistance of counsel, denial of a fair trial, denial of due process, and a denial of access to the prison library. The petition was transferred to the United States District Court for the Southern District of California. The district court denied the petition on July 19, 1989, after finding that the grounds for relief, either were, or should have been, presented in previous petitions to the court. Appendix B at 113-114.

A fifth petition was filed in the district court on March 7, 1990. Hamilton v. Vasquez, Case No. 90-0291-B. The fifth petition was consolidated with Hamilton's second federal petition (case number 86-2101-B) on June 8, 1990. Appendix B at 114.

After being ordered to identify all of his known issues and to exhaust all claims in state court, Hamilton filed his "amended" petition in the district court on October 22, 1990. Appendix B at 114-121.

The district court has held that Hamilton's petition of October 22, 1990, (consolidated second and fifth federal petitions) constitutes his "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings regarding successive and abusive petitions. This amended and consolidated "first" petition proceeded to an evidentiary hearing. Appendix B at 120.

3. District Court Evidentiary Hearing and Appeal

On April 23, 1991, a three-week evidentiary hearing commenced in the district court before the Honorable Rudi M. Brewster, on issues of shackling and ineffective assistance of counsel,

including defense investigation of Hamilton's whereabouts and defenses. Hamilton was transported from death row at San Quentin state prison in Northern California to the federal courthouse in San Diego in early April, and was present in court throughout the proceeding. Appendix B at 120.

At the conclusion of the evidentiary hearing, Hamilton moved to have the hearing held open to enable him to investigate and present additional claims. The district court denied the request, citing its previous orders requiring Hamilton to pursue unexhausted claims in state court and exhausted claims in federal court by October 22, 1990, and its order finding that Hamilton had in fact waived all such claims. Appendix B at 115-120, 271.

Extensive written briefs were filed by the parties following the

evidentiary hearing. On July 1, 1991, Hamilton requested a stay of the federal proceedings and funds for investigation of potentially meritorious claims. On August 20, 1991, the district court denied the request for a stay.

On August 23, 1991, the district court filed a 93 page opinion denying the petition for writ of habeas corpus. Appendix B at 110-273. The district court found the commutation instruction "not constitutionally infirm" and "[m]ost importantly, the modifications agreed to by the parties improved the unmodified commutation instruction from the defense perspective." Appendix B at 248. The district court denied Hamilton's in pro per motion for reconsideration on September 10, 1991. Hamilton's counsel's motion to alter or amend the judgment was denied on October 31, 1991.

On November 13, 1991, a certificate of probable cause was granted and a stay issued pending disposition of Hamilton's appeal of the denial of the petition for writ of habeas corpus before the Ninth Circuit Court of Appeals.

On March 17, 1992, Hamilton filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking to reopen the district court proceedings in order to amend his habeas corpus petition to bring additional claims. On July 1, 1992, the district court issued an order stating it would entertain the motion if the Ninth Circuit remanded the case for consideration of the motion. Following remand by the Ninth Circuit, a hearing was conducted on the Rule 60(b) motion on August 25, 1992, and it was denied on September 28, 1992. Hamilton appealed. Hamilton v. Vasquez, 93-55039. The Ninth Circuit consolidated

Hamilton's appeal from the denial of his consolidated amended petition for writ of habeas corpus with his appeal from the denial of his Rule 60(b) motion.[1]

4. The Published Reversal

On February 3, 1994, the Ninth Circuit majority reversed the district court's denial of habeas corpus relief on Hamilton's claim that the modified commutation instruction given in the

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1. During the pendency of his appeal to the Ninth Circuit, Hamilton has filed two more petitions for habeas corpus in the district court. His sixth petition, filed in pro per, raises nine claims of ineffective assistance of trial and appellate counsel, denial of constitutional rights based on an 18-day adjournment during deliberations in his state court trial and the denial of a request for self representation. Hamilton v. Vasquez, CV-92-1837-B. On March 31, 1992, Hamilton's counsel filed a petition for habeas corpus raising 16 claims. Hamilton v. Vasquez, CV-92-474-B. Answers asserting an abuse of the writ and successive petitions have been filed to both of these petitions, a traverse was filed on or about January 18, 1994, and the petitions are pending in the district court.

penalty phase of his trial violated his Eighth and Fourteenth Amendment rights and required a new penalty phase trial. Hamilton v. Vasquez, ___ F.3d ___; Appendix A, at 71-72. The unmodified commutation instruction has been found constitutional by this Court. California v. Ramos, 463 U.S. 992 (1983). On remand, the state court found the commutation instruction violated the California Constitution. People v. Ramos (Ramos II) 37 Cal. 3d 136, 150-159, 689 P.2d 430 (1984). Despite that fact, the California Supreme Court concluded that the California error created by Hamilton's commutation instruction in this case "was non-prejudicial." People v. Hamilton, 45 Cal. 3d 351, 375, 247 Cal. Rptr. 31, 753 P.2d 1109 (1988). It also found the prosecutor's comment that Hamilton would connive and devise ways to manipulate the system was neither intended to refer to

the commutation instruction nor that the jury so understood it. Id., at 375-376.

The Warden of San Quentin Prison and the Attorney General of the State of California petition for certiorari to correct the Ninth Circuit two judge majority's misinterpretation of federal and state law in reversing the judgment of death.

On March 31, 1994, Judge Schroeder of the Ninth Circuit granted a 30 day stay in the issuance of the remittitur so that the state could bring this petition. Appendix C.

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REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the two judge majority of the Ninth Circuit panel has denied the state its right to enforce its criminal laws by reversing a judgment of death based on perceived misstatements of state law in a jury instruction and conjecture about jurors not following instructions. The Ninth Circuit two judge majority achieved an untenable interpretation of a penalty phase jury instruction in order to bypass this Court's holding in California v. Ramos, 463 U.S. 992 (1983). The majority then found the instruction constituted reversible error without engaging in the analysis required by Boyde v. California, 494 U.S. 370 (1990) and Brecht v. Abrahamson, 507 U.S. ___, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993). In bypassing the holding in Ramos and reversing the death sentence in this case, the Ninth

Circuit majority has also violated this Court's holding in Teague v. Lane, 489 U.S. 288 (1989) by retroactively applying a new rule of law on collateral review.

While California no longer requires instruction of the jury with the penalty phase instruction approved by this Court in Ramos, there remain several capital cases, which are still pending federal habeas review, wherein the instruction to the jury was identical to the instruction given in this case. See e.g., People v. Coleman, 46 Cal.3d 749, 780-782, 251 Cal. Rptr. 83, 759 P. 2d 1260 (1988), United States District Court, Northern District No. 89-1906 RMW; People v. McLain, 46 Cal.3d 97, 119-120, 249 Cal. Rptr. 630, 757 P. 2d 569 (1988), United States District Court, Central District, Case No. CV-89-3061-JGD; People v. Whitt, 51 Cal.3d 620, 655-657, 274 Cal. Rptr. 252, 798 P. 2d 849 (1990), United States

District Court, Central District, petition not yet filed. Six to eight other California capital cases may also be at risk from the holding in this case. Accordingly, the validity of the instruction itself, and the retroactive application of a new rule of law in the published opinion of the Ninth Circuit affects considerably more than nearly 15 years of litigation by the People of California to bring Bernard Hamilton to justice.

The district courts will be bound by the two judge majority opinion in this case. See, United States v. Bagley, 659 F.Supp. 223, 227 (W.D. Wash. 1987) citing Boys Markets Inc. v. Retail Clerks Union, 398 U.S. 235, 240-241 (1970); see Barreto v. United States, 694 F.2d 603, 607 (9th Cir. 1982). Moreover, absent being overruled by the Ninth Circuit Court of Appeals en banc or an opinion of this

Court, no other panel of the Ninth Circuit can depart from the two judge majority opinion in this case. Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993) citing United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989); see also, United States v. Hardesty, 977 F.2d 1347, 1347-1348 (9th Cir. 1992); Morton v. DeOliveira, 984 F.2d 289, 292 (9th Cir. 1993). Thus, at a minimum four California death sentences are imperiled by this single two judge opinion.

Moreover, beyond the commutation instruction itself, the Ninth Circuit majority's refusal to adhere to the reasonable likelihood test enunciated by this Court in Boyde v. California in reviewing claims of instructional error in the penalty phase of capital cases and failure to apply the harmless error standard set forth in Brecht v. Abrahamson to non-systemic error in the penalty phase

of capital cases has broad implications. There are approximately 624 condemned inmates in state prisons in seven states having a death penalty within the jurisdiction of the Ninth Circuit Court of Appeals. Accordingly, the encroachment of the Ninth Circuit into matters of state law for the purpose of reversing judgments of death threatens a basic and fundamental denial of due process of law, not just to California, but to all states within the jurisdiction of the Ninth Circuit.

Additionally, the two judge majority opinion improperly denies California the ability to rely upon the precedent of this Court, by retroactively applying a new rule of law on collateral review. By reversing a sentence of death based on a jury instruction which is more favorable to the defendant than the instruction expressly upheld by this Court in California v. Ramos, the Ninth Circuit

has necessarily created a new rule of law. The two judge majority opinion ignores the bar to retroactive application of new rules of law on collateral review. Teague v. Lane, 489 U.S. 288, rhg. den. 490 U.S. 1031. In failing to apply Teague to preserve the death sentence in this case, when no recognized exception to Teague applies, the Ninth Circuit opinion necessarily creates a new exception to Teague which should not be permitted to stand.

For the reasons stated in the well-reasoned dissent of Judge Trott, Petitioners respectfully urge this Court once again to grant Petition for Writ of Certiorari in this matter.

INTRODUCTION

On February 3, 1994, the Ninth Circuit Court of Appeals issued an opinion reversing the death penalty of Bernard Lee Hamilton on the basis that the modified

commutation instruction violated his due process and Eighth Amendment rights, requiring a new penalty phase trial. The majority has reversed a state judgment of death based on a commutation instruction more favorable to the defendant than the one approved by this Court as constitutional in California v. Ramos, 463 U.S. 992 (1983). To reach its result, the Ninth Circuit two judge panel majority misinterprets the language of the commutation instruction, erroneously assumes it misstated California law and misinterprets both Boyde v. California, 494 U.S. 370, and California v. Ramos. Furthermore, the majority neither conducts a prejudice analysis nor states what standard it used in arriving at its finding of prejudice. In short, it has granted habeas relief without federal constitutional error, without undertaking an appropriate harmless error analysis or

applying any standard for harmless error and retroactively applied its new rule of constitutional law in violation of Teague v. Lane, 489 U.S. 288.

Eight years ago this Court granted the state's petition for writ of certiorari. California v. Hamilton, 476 U.S. 1301. After 15 years of litigation, the state once again turns to this Court to enable the People of California to bring Bernard Hamilton to Justice.

ARGUMENT

I

THE MAJORITY REVERSED A DEATH PENALTY CASE BASED ON A PERCEIVED VIOLATION OF STATE LAW AND MISINTERPRETATION OF CALIFORNIA V. RAMOS

At the time Hamilton was tried, the Briggs commutation instruction was mandated by the California Constitution and provided as follows:

> "You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that could include the possibility of parole."

That instruction was approved by this Court in California v. Ramos, 463 U.S. 992, 995-996, (1983).[2/] In Hamilton's

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2. The Ninth Circuit majority correctly observes that the Briggs instruction is no longer given because the California Supreme Court on remand found that it violated California's due

case, the governor could not commute the life sentence without possibility of parole to life with possibility of parole unless at least four of the California Supreme Court Justices gave prior approval, because Hamilton had been convicted of two prior felonies. Cal. Const., Art. V, § 8; Cal. Pen. Code, § 4852. Consequently, the instruction ultimately given with the consent of both parties modified the commutation instruction in this case to state:

> "You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of a crime. Under this power, a governor may, in the future, commute or modify a sentence of life imprisonment without a possibility of parole

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process clause. People v. Ramos, 37 Cal. 3d 136, 689 P. 2d 430 (Ramos II) (1984), cert. den. 471 U.S. 1119 (1985). However, the instruction suffers no infirmity under the United States Constitution. California v. Ramos, 463 U.S. at 992.

to a lesser sentence that would include the possibility of parole.

"This is subject to the requirement that in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years, less one-third off for good time credit before parole may be considered by the proper authorities.

"<u>You are now instructed, however, that the matter of a possible commutation or modification of instruction is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur</u>.

"It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive." State RT 4667-4668, emphasis added.

There was no federal constitutional error in this instruction. The first paragraph is basically the

instruction expressly approved by this Court in California v. Ramos. The instruction in Hamilton's case, as in Ramos, essentially told the jury that the alternate sentence was "life imprisonment with possibility of commutation." No credible argument can be made that, contrary the holding in Ramos, "the Constitution prohibits this State from accurately characterizing its sentencing choices." California v. Ramos, 463 U.S. at 105, fn 19.

To avoid the binding effect of Ramos, the Ninth Circuit majority attempts to distinguish it by attacking the modification made to the instruction in this case as a misstatement of state law that caused the jury to speculate. The majority states "[T]he two-sentence Briggs instruction upheld in Ramos was inapplicable to Hamilton because, unlike the defendant in Ramos, Hamilton was a

twice-convicted felon and therefore was subject to different commutation requirements." Hamilton v. Vasquez, ___ F.3d ____; Appendix A. at 45-46. While the commutation requirements in California are in fact different for twice convicted felons, that difference does not in any way support a conclusion that the commutation instruction was inapplicable to Hamilton's case. The commutation instruction was mandatory under the California Constitution when Hamilton was tried, irrespective of whether he was a twice convicted felon. Moreover, nothing in the holding in Ramos suggests that California was any less entitled to inform its jury about the sentencing choices because Hamilton was a twice convicted felon.

The only conceivable complaint would be if the jury was misinformed by an unmodified commutation instruction denying

them the knowledge that Hamilton would face additional hurdles for commutation as a twice convicted felon. No such complaint is viable here, as the trial court prudently modified the instruction to give information tailored to the case. The jury was not left with any misimpression that Hamilton's possibility of commutation was greater than that actually allowed by law.

The majority opinion erroneously states that the instruction given in Hamilton's case misstated California law. The California Supreme Court found no such misstatement.[3/] Despite this Court's holding that a federal court has no basis for disputing a state's interpretation of its own laws (Clemons v. Mississippi, 494

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3. The Ninth Circuit's interpretation of California's commutation law is also inconsistent with the interpretation by Hamilton's own attorneys which can be inferred from their consent to the instruction given below. State RT 4667-4668.

U.S. 738 (1990)), the Ninth Circuit majority ignores the import of California's application and interpretation of its own laws.

Contrary to the Ninth Circuit majority's assertion, Hamilton's jury was never told that "if it sentenced Hamilton to life imprisonment without possibility of parole, he would be eligible for parole after serving only 16 year and 8 months in prison." Hamilton v. Vasquez, ___ F.3d ___; Appendix A. at 47. The instruction given in this case accurately stated the law of commutation, including the added hurdles Hamilton would face for commutation. The modifications made the instruction more favorable to the defense than the instruction approved by this Court in Ramos. Additionally, Hamilton received the benefit of an admonition to the jury to disregard the possibility of

commutation in determining the appropriate penalty.

The district court properly concluded that the instruction given favored Hamilton by telling jurors the possibility for parole was "remote." Appendix B. at 249. It in fact told them that there were legal restrictions to changing any life without possibility of parole sentence to life with possibility of parole for someone with Hamilton's record. Four justices of the Supreme Court would have to recommend it and the Governor would have to agree. Even if that all happened the jury was told additionally that Hamilton would have to serve a minimum of nearly 17 years to even be eligible for parole, following any commutation. Finally, unlike Ramos, this jury was expressly told not to speculate about future action by government officials, was refocused on its proper

function to decide which of the two penalties was appropriate for Hamilton and was expressly told it must assume that the governor, Supreme Court and those officials charged with operation of the parole system would perform their duties in a correct and responsible manner and that "Mr. Hamilton will not be paroled unless he can be safely released into society." State RT 4669.

The Ninth Circuit majority rejects the fact that the instruction was more favorable to Hamilton than the instruction approved in Ramos by contending it is inconsistent to instruct the jury regarding the possibility of commutation only to then admonish the jury to disregard the possibility of commutation in reaching a verdict on the appropriate penalty in the case. The majority's point ignores the fact that the commutation instruction was mandatory

under the California Constitution. Consequently, it is disingenuous to conclude, as the majority did here, that the fact that the jury was not to consider the possibility of commutation modification or parole in the future was "wholly inconsistent with the prosecution's request that the jury be expressly instructed to consider the governor's power of commutation." Hamilton v. Vasquez, ___ F.3d ____; Appendix A. at 47-48. There is absolutely no inconsistency in the prosecutor's request for the instruction mandated by the state constitution and the jury being admonished not to consider commutation.

The majority's criticism ignores the reality that jurors might know about the commutation power and have inaccurate information which would lead them to conclude that the defendant was likely to get out of prison if they did not vote for

death. This Court acknowledged this purpose when it said that the "instruction invites the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society." California v. Ramos, at 1005.

By giving the jury more accurate information than it may have about commutation, it is more likely jurors would look at the California Penal Code section 190.3 factors relevant to determining life without possibility of parole or death. In this case, that likelihood was only enhanced by the added admonition not to consider the possibility of commutation in reaching a decision as to penalty.

The majority's conjecture that the jurors in fact violated their oath and speculated about commutation after being expressly admonished not to speculate

rests with an untenable departure from the well established presumption that jurors follow instructions. Francis v. Franklin, 471 U.S. 307, 324, n. 9 (1985); Delli Paoli v. United States, 352 U.S. 232, 242 (1957). The jurors were expressly told not to use the commutation instruction in determining penalty. As the California Supreme Court concluded, there is "no reason to believe that the jurors failed to discharge their duty." Hamilton II, 45 Cal. 3d at 375.

The jury was given accurate information about commutation and was then told it was not something for the jury to consider in determining penalty because commutation was a matter for the responsible government officials as limited by law. Ramos tells us that the giving of accurate information about commutation does not create an error,

accordingly, there was no error in Hamilton's case.

Reexamination of a state conviction on federal habeas frustrates California's power to punish offenders and its "good faith attempt to honor constitutional rights." McCleskey v. Zant, 499 U.S. 467 (1991), citing other authority. The federal court system has an undeniably important duty to perform in safeguarding constitutional rights. However, a federal court conducting habeas review "is limited to deciding whether a conviction violated the Constitutional, law, or treaties of the United States." 28 U.S.C. § 2241; Estelle v. McGuire, 502 U.S. ____, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475 (1991). It is "not the province of a federal habeas court to reexamine state court determinations on state law questions." Id.

The Ninth Circuit's end run around this Court's opinion in Ramos has served to reverse a valid judgment of death in the absence of any constitutional infirmity. Moreover, the published opinion threatens the reversal of a number of other capital cases pending federal habeas review, wherein the same instruction was given. Accordingly, Petitioners respectfully urge this Court to grant certiorari and resolve this important question of law.

II

A FEDERAL COURT SHOULD NOT SET ASIDE A STATE COURT DEATH SENTENCE BASED ON PURPORTED INSTRUCTIONAL ERROR IN THE PENALTY PHASE WITHOUT APPLYING THE REASONABLE LIKELIHOOD TEST ENUNCIATED BY THIS COURT IN BOYDE V. CALIFORNIA AND THE APPROPRIATE HARMLESS ERROR STANDARD

Independent of ignoring this Court's holding in Ramos, the majority's result is inconsistent with the approach this Court enunciated for determining if a

challenged instruction was applied in an unconstitutional manner. The proper inquiry is not whether the challenged instruction "could have been" applied in an unconstitutional manner, but whether there is a reasonable likelihood the jury did so apply it. Victor v. Nebraska, Sandoval v. California, ___ U.S. ___, 127 L. Ed. 2d 583, 62 U.S.L.W. 4179, 4180 (1994); Estelle v. McGuire, 502 U.S. ___, n. 4; Boyde v. California, 494 U.S. at 370, 386.

While acknowledging that the reasonable likelihood test of Boyde is stringent, the Ninth Circuit majority nonetheless finds error after concluding the test is not as stringent as seen by the dissent. Hamilton v. Vasquez, ____ F.3d. ____; Appendix A. at 59. In reality by engaging in its own speculation in order to find jury speculation, the

majority departs from the holding of this Court.

The majority's speculation that the jury was misled "where the trial court told the jury not to consider what it had just been instructed were relevant considerations" (Hamilton v. Vasquez, ___ F.3d ___; Appendix A. at 58) is wrong for two reasons. First, the jury was told commutation was not a relevant consideration. The jury was told to ignore commutation and do its task based on the evidence and California Penal Code section 190.3 factors. Second, the majority's assumption that the jury in fact was confused by the commutation instructions and voted for death, ignores the fact that the jury spent three days deliberating the penalty.

While the majority suggests that the length of the deliberation indicated this was a "close case" (Hamilton v.

Vasquez, ___ F.3d ___; Appendix A. at 55-56), it ignores the obvious. Why did the jury deliberate for three full days if it violated its oath, and in fact considered what it was told not to consider or to believe, i.e. that Hamilton would likely be released on parole in under 17 years? Had the jury been misled in the manner suggested by the majority opinion, it would have returned a speedy penalty verdict.

As the California Supreme Court found after finding no prejudice from the instruction based on a violation of the California Constitution, the trial court's instructions:

> ". . . directed the jurors not to make any use of the Briggs instruction in determining the penalty to be imposed on defendant. Jurors are, of course, presumed to follow the instructions given by the court. (E.g., Delli Paoli v. United States, (1957) 352 U.S. 232, 242, [1 L. Ed. 2d 278, 285-286, 77 S. Ct. 294].) In this case we find no reason to

> believe that the jurors failed to discharge their duty." Hamilton II, 45 Cal.3d at 375.

On habeas, non-systemic constitutional error is judged by the Kotteakos harmless error standard. Brecht v. Abrahamson, 123 L. Ed. 2d at 373. That standard, normally applied to non-constitutional error on direct appeal, allows reversal only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776 (1946). Under Brecht, the defendant has the burden of proving the alleged error was not harmless. O'Neal v. Morris, 3 F.3d 143 (6th Cir. 1993), cert. granted April 4, 1994, No. 93-7407, 62 U.S.L.W 3680. The majority opinion does not undertake any harmless error analysis or state under what standard it found prejudice when it reversed this penalty.

If telling a jury about a governor's power to commute or modify a sentence of life without possibility of parole does not violate the Constitution (California v. Ramos, 463 U.S. at 105), adding information about what happens under state law does not change the conclusion. In fact, the added information favors Hamilton by showing the significant legal impediments to any possibility that he might ever be freed from prison. The dissent and the district court judge correctly observed that the modification agreed to by the parties "improved the unmodified Briggs [commutation] instruction from the defense perspective." Hamilton v. Vasquez, ___ F.3d ___; Appendix A. at 87; Appendix B. at 248.

The evidence in this case was very strong and the crime was "monstrous." Appendix A, (Trotter, J., dissent) at 98.

Any error in the commutation instruction was harmless. This was an ultimate penalty case and an ultimate penalty defendant. As the dissent observes, "the weak mitigating evidence cited by the majority fades into utter insignificance" when measured against the brutal slaying of Eleanore Buchanan, who was still nursing her three-week old baby boy before Hamilton severed her head and hands with saws and knives. Id., at 97-98.

That baby boy is about to celebrate his 15th birthday. The prejudice to the state from the reversal at this time is obvious. When a habeas petitioner succeeds in obtaining a new trial, the government is prejudiced by the long passage of time and has a diminished chance of a reliable criminal adjudication. McCleskey, 499 U.S. 467; see also, In re Blodgett, 502 U.S. ___, 116 L. Ed. 2d 667, 112 S. Ct. 674 (1992)

[recognizing the state's strong interest in finality of judgments and the need for "prompt resolution" of habeas cases]; United States v. Sudthisa-Ard, ___F.3d ___ [Dock. No. 92-50375] (9th Cir. 1994) [Ninth Circuit finds it unconscionable to allow a federal defendant to benefit from a 13-year delay by forcing the government to re-prosecute after memories have dimmed and evidence has been lost].

The only prejudice in this case is to the state from the Ninth Circuit opinion reversing a death sentence in the absence of constitutional infirmity. The majority's holding rests with a misinterpretation of the instruction given below and a misinterpretation of Ramos and Boyde.

Furthermore, even if there were constitutional error in the penalty phase of this case, it would be harmless in view of the quality of the mitigating evidence

offered when weighed against Hamilton's crime and prior record of violence and convictions.

III

THE MAJORITY RETROACTIVELY APPLIES A "NEW RULE" OF CONSTITUTIONAL LAW ON COLLATERAL REVIEW THROUGH ITS MISINTERPRETATION OF RAMOS

As detailed above, despite the fact that the California commutation instruction survived constitutional challenge in California v. Ramos, 463 U.S. 992, the majority found a violation of the due process clause by the modifications made to the commutation instruction in this case. Where Ramos decided that the commutation instruction alone does not invite jury speculation or do more than accurately portray the alternate punishment to death, the Ninth Circuit two judge majority opinion draws the opposite conclusion about the instruction given below, despite the fact that the jury was

expressly told not to speculate about commutation or consider commutation when arriving at its verdict. By finding a violation of due process in an instruction more favorable to the defendant than the one considered by Ramos, the two judge majority opinion creates a "heads you lose, tails you lose" death penalty jurisprudence.[4] The Ninth Circuit's departure from the precedent of Ramos constitutes a new rule of constitutional law which cannot be applied to Hamilton on collateral review. Teague v. Lane, 489 U.S. 288, (1989); Saffle v. Parks, 494 U.S 484 (1990); Caspari v. Bohlen, 510 U.S.

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4. The irony produced by the two judge decision is that an unvarnished commutation instruction will result in a reversal under California, but not federal, decisions, while a modified instruction is harmless in California, but reversible in the Ninth Circuit.

____, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994).[5]

Generally, new rules of constitutional law will not be applied or announced in cases on collateral review. Teague v. Lane, 489 U.S. at 301. This limitation on relief is equally applicable to capital cases. Graham v. Collins, 506 U.S.___, 122 L. Ed. 2d 260, 113 S. Ct. 892, 897 (1993).

The Ninth Circuit failed to determine "as a threshold matter, whether granting him the relief he seeks would create a 'new rule' of constitutional law." Graham v. Collins, 113 S. Ct. at 897.

A holding creates a "new rule" of law, if it "breaks ground," "imposes a

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5. Teague was not argued in district court or in the Ninth Circuit because Ramos was clearly in favor of the judgment. The new rule arose when the majority made an unexpected departure from Ramos and Boyde.

new obligation on the States or Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." Teague, 498 U.S. at 301. As the expansive procedural history of Hamilton's case detailed above shows, his conviction is clearly final.

In "surveying the legal landscape as it then existed . . . it would have been anything but clear to reasonable jurists" (Graham v. Collins, 113 S. Ct. at 898) in 1981 that the commutation instruction given below was constitutionally infirm. The state is entitled to rely on this Court's unambiguous holding in Ramos permitting the state to inform jurors regarding their penalty choices, including a discussion of commutation.

There are two exceptions to the general principle of law announced in

Teague. Neither of the exceptions has any application in this case.

The first exception permits retroactive relief from a new rule, if the rule of law "places a class of private conduct beyond the power of the State to proscribe" (Teague, 489 U.S. at 311) or relates to a "'substantative categorical guarantee accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" Saffle v. Parks, 494 U.S. at 494. quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989). This exception is clearly not applicable to Hamilton. Hamilton's effort to obtain a rule of law precluding the commutation instruction given below would not "decriminalize a class of conduct" or prohibit the "imposition of capital punishment on a particular class of persons." See, Graham

v. Collins, 113 S. Ct. at 903. The second exception to Teague is no more availing.

The second exception permits federal court to announce "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. at 495, quoting Penry v. Lynaugh, 492 U.S. at 330. This second exception:

> "is clearly meant to apply only to a small core of rules requiring '"observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'"'" Graham v. Collins, 113 S.Ct. at 903, quoting Teague, 489 U.S. at 311, quoting Mackey v. United States, 401 U.S. 667, 693, 28 L.Ed.2d 404, 91 S.Ct. 1160 (Harlan, J., concurring & dissenting) (1971).

In noting the absence of this second exception to Teague regarding an Eighth Amendment challenge to the capital sentencing scheme in Texas, this Court recently observed:

> "As the plurality cautioned in Teague, `[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.'" Graham v. Collins, 113 S.Ct. at 903, quoting Teague, 489 U.S. at 313.

Nothing in the jury's awareness of commutation law and the admonition not to consider commutation "seriously diminish[ed] the likelihood of obtaining an accurate determination" in Hamilton's capital sentence proceeding. Accordingly, by applying their decision retroactively, the Ninth Circuit has carved out a new exception to Teague which essentially swallows the rule itself. The Ninth Circuit two judge majority should not be permitted to reverse state death sentences on collateral review in contravention of Teague.

CONCLUSION

The injustice of reversing capital cases because an instruction was more favorable to a defendant than one already approved by this Court affects more than the judgment in this case and those similarly situated. It serves to engender disrespect for the judicial system by its citizenry, who should not be expected to accept such a result under the guise of justice.

For all of the reasons stated herein, Petitioners respectfully urge that the Court once again grant certiorari in this matter and resolve the important issues of law presented herein; or alternatively reverse and remand the judgment of the Ninth Circuit in light of

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this Court's decisions in California v. Ramos, 463 U.S. 992, Boyde v. California, 494 U.S. 370, Brecht v. Abrahamson, 507 U.S. ___ and Teague v. Lane, 489 U.S. 288.

DATED this 19th day of April 1994.

Respectfully submitted,

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No: 93 _____
October Term, 1993

ARTHUR CALDERON, Warden,
San Quentin Prison, and
DANIEL E. LUNGREN,
Attorney General

Petitioners,

v.

BERNARD LEE HAMILTON,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI WITH APPENDICES 1 AND 2 as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Peter Benzian
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Hon. Rudi M. Brewster
United States District Court
940 Front Street
San Diego, CA 92189

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 19th day of April 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 19, 1994.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 19th day of April 1994.

Jean M. Burns
Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC – CALIFORNIA
THE COUNTY OF SAN DIEGO
My Commission Expires Sept. 17 1995

Supreme Court, U.S.
FILED

No. 93 931652 APR 20 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

APPENDICES (VOLUME I) TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Supreme Court
of Appeals for the
Ninth Circuit Opinion A-1 - A-109

FOR PUBLICATION

Filed Feb. 3, 1994

UNITED STATES SUPREME COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD LEE HAMILTON,	)	Nos. 91-56251
	)	91-56252
Petitioner-Appellant,	)	91-56295
	)	91-56403
vs.	)	91-80385
	)	93-55039
DANIEL VASQUEZ, Warden of	)	
San Quentin; THE ATTORNEY	)	D.C. Nos.
GENERAL OF THE STATE OF	)	CV-86-
CALIFORNIA,	)	2101-RMB
	)	CV-90-
Respondents-Appellees.	)	291-RMB
	)	
	)	OPINION

Appeal from the United States
District Court
for the Southern District of California
Rudi M. Brewster,
District Judge, Presiding
Argued and Submitted December 15, 1992
San Francisco, California
Filed: February 3, 1994

Before: SCHROEDER, FLETCHER and TROTT, Circuit Judges.

SCHROEDER, Circuit Judge:

Bernard Hamilton, a California state prisoner sentenced to death, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. The case arises from Hamilton's conviction in San Diego

County Superior Court for first degree murder, burglary, robbery and kidnapping in violation of Cal. Penal Code §§ 187, 459, 211, 207, and his sentence to death. He also appeals from the denial of his Rule 60(b) motion asking the district court to consider, as part of his original petition for habeas relief, claims that he had failed to exhaust during the pendency of the habeas petition. We affirm the district court's denial of the Rule 60(b) motion and the denial of relief on the merits on those claims going to the validity of the underlying convictions. We hold that Hamilton is entitled to relief only with respect to the penalty phase of the state court proceedings, because on the basis of the confusing instruction given, the jury could not have made a reasoned and informed choice between a death sentence and a life sentence without possibility of parole.

The factual circumstances of this case are set out at length in People v. Hamilton, 710 P.2d 981 (Cal. 1985), vacated, California v. Hamilton, 478 U.S. 1017 (1986) (Hamilton I), and People v. Hamilton, 753 P.2d 1109 (Cal. 1988), cert. denied, 488 U.S. 1047 (1989) (Hamilton II). Hamilton's convictions arise from the death of Eleanore Frances Buchanan. Mrs. Buchanan's body was discovered near San Diego, California, on May 31, 1979. The body's head and hands were missing. Two strings of white cord were tied to her ankles, blue fibers were stuck to her body and tie marks were present on her wrists. There were stab marks in her abdomen and evidence showed that her head and hands were removed by use of both a knife and a saw.

On the day of her disappearance, Mrs. Buchanan left her home driving the family's blue van in order to attend class

at Mesa College. Her husband testified that she was wearing tan Levis, a brown and beige shirt, and carrying a brown purse. Mrs. Buchanan attended class and was last seen alive at about 9:30 p.m. as she walked toward the school parking lot.

Bernard Hamilton was stopped while traveling in a blue van in Oklahoma on June 8, 1979. When the police checked the vehicle identification number, they learned that the van belonged to Mrs. Buchanan. Hamilton was arrested. During the preceding week, Hamilton had used the Buchanans' credit cards to buy food, gas and other items, including a saw, a screwdriver and a set of wrenches, a butcher knife and twine. Blood on the floor of the van and blood on Hamilton's shoe matched the blood type of the victim.

San Diego police interviewed Hamilton in Oklahoma on the day after his arrest. Hamilton waived his Miranda rights and

told the police that he had traveled from San Diego with "Fran" (Mrs. Buchanan's nickname) and "Spider," Calvin Spencer. He said that Mrs. Buchanan had left her husband for Spider, and that the two departed for Louisiana, leaving Hamilton with the van and credit cards. Hamilton identified Mrs. Buchanan from a picture and stated that when he saw her she was wearing "light colored jeans and carrying a beige non-leather purse."

At trial, the prosecution presented evidence that Hamilton had called Donna Hatch in Terrell, Texas on May 31, 1979 from his parents' home in San Diego. He told Hatch that he would leave for Texas in a van when the gas station opened in the morning. Hamilton used the Buchanans' credit card to buy gas between 4:45 a.m. and 10:15 a.m. on May 31, 1979. He also bought gas later in the day in El Centro, California and in Tucson, Arizona.

Hamilton arrived in Terrell on June 1. Hatch's testimony was that when the van arrived, it was dirty, and the arm of the driver's chair, the mirror and the window on the passenger side were broken. Hatch stated that she saw credit cards in the names of Terry and Eleanore Buchanan in the van. Hatch also testified that she heard Hamilton call his brother and tell him that he had flown to Texas. Hamilton told Donna that he "thought he had killed a man but he did not want to tell her any details because she might not want to have anything to do with him if he told her." Hamilton I, 710 P.2d at 984.

At trial an inmate at the San Diego jail, Steven Thomas, testified that he had spoken with Hamilton, who said "well I did it but they'll never prove it." Id. at 985. When Hamilton was transported to the courtroom on August 21, 1979, he apparently told Sheriff Parsons: "alright,

you have your fun, I'll have mine later." The Deputy responded, "I thought you already had your fun." Hamilton responded, "Yea, and I'll kill a lot more, too, and you may be first on my list." Id. at 985.

Hamilton testified at trial that he had never seen the victim. He stated that he found the van parked on a street between 12:45 and 1:00 a.m. on May 31. The keys were in the ignition and he drove the van home, called Hatch and left for Texas later that morning. He testified that he invented the story about spending time with Spider and Fran so that he would not be charged with theft of the van. He denied the threats to Donna Hatch. He explained that he bought the saw and other knives in order to rob a store in Texas.

Hamilton was convicted of first degree murder, burglary, robbery and kidnapping. He was sentenced to death on

March 2, 1981. The California Supreme Court, on appeal, affirmed the conviction as to Hamilton's guilt but reversed his death sentence. See People v. Hamilton, 710 P.2d 981 (Cal. 1985). In upholding the conviction, the court ruled that there was no error in the trial court's denial of Hamilton's motion to proceed in pro per. The court also upheld the trial court's decision to shackle Hamilton during trial. The court agreed with Hamilton that it was error to allow into evidence letters that he had written while in jail on an earlier conviction. Id. at 992. However, the court ruled that the evidence was not prejudicial, and refused to overturn the conviction. The court upheld the admission into evidence of another letter, written by Hamilton to Theresa Roch, which threatened the defense attorney, prosecutor and witnesses in his murder trial. The court upheld the

admission of Hamilton's statement to Sheriff Parsons. It also affirmed the admission into evidence of the saw, knife and twine that Hamilton purchased. The court ruled that any error in the admission of Steven Thomas' testimony was harmless beyond a reasonable doubt.

With respect to his death sentence, Hamilton argued that the special circumstance finding should be set aside and the death penalty reversed due to error under Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983), because the court did not instruct the jury on the necessity for intent to kill in the felony-murder special circumstance. The Supreme Court agreed, and set aside the finding of the special circumstance, reversed the death penalty but affirmed on all other grounds.

Hamilton I was vacated by the Supreme Court, California v. Hamilton, 478 U.S. 1017 (1986), for consideration in light of

Rose v. Clark, 478 U.S. 570 (1986). On remand, in Hamilton II, the California Supreme Court upheld the special circumstance finding and the sentence of death. People v. Hamilton, 753 P.2d 1109 (Cal. 1988), cert. denied, 488 U.S. 1047 (1989).

Hamilton thereafter filed a petition in district court, pro se, setting forth exhausted claims. Hamilton contended that shackling his hands and legs at trial was unconstitutional (1 CR 1). The district court dismissed the petition without reviewing the state court record. On appeal, this court reversed the judgment of the district court and remanded the case, instructing the district court to examine the entire trial court record and conduct an evidentiary hearing if necessary. Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989). We also directed the appointment of counsel.

Hamilton filed three more petitions, two of which were dismissed, and one of which was consolidated with the pending petition (SER 8; ER 210). On March 6, 1990, the district court ordered Hamilton to identify, within 90 days, all additional claims to be raised on habeas corpus (ER 207-08). Hamilton identified 38 claims, the majority of which were unexhausted (id. at 245-256). On June 21, 1990, following Judge Alarcon's concurring opinion in Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988), cert. denied, 493 U.S. 906 (1989) (Alarcon, J. concurring), the district court ordered Hamilton to file all the unexhausted claims in state court, or amend the petition to contain only exhausted claims, by August 8, 1990 (id. at 211). On September 18, 1990, the district court extended the time for Hamilton to exhaust state remedies until October 22, 1990 (id.

at 212-14). In addition, the district court ordered that any claims that had not been filed in state court or any exhausted claims not raised in federal court by that date would be considered waived (id.).

Hamilton filed an amended consolidated petition in the district court on October 22, 1990, the denial of which is the basis of the present appeal to this court (2 CR 48). This petition superceded the pending consolidated petitions (id.). He had not filed any unexhausted claims with the state court, and all claims raised in the petition had been exhausted (ER 119). The district court, on November 21, 1990, ordered that all claims not included in the amended petition were deemed waived (id. at 215(b)). The district court then conducted a three-week evidentiary hearing (I-X EH). At the end of the evidentiary hearing, the district court denied

Hamilton's motion to stay the proceedings in order to present new evidence (ER 216-22).

On August 23, 1991, the district court denied the petition (id. at 114-206). The district court granted a certificate of probable cause to appeal on November 13, 1991 (id. at 229-30). Hamilton timely appealed (id. at 44). Hamilton then filed in the district court a Fed. R. Civ. P. 60(b) motion for relief from the judgment and for leave to amend the habeas corpus petition. The district court denied the motion on September 28, 1992 (13 CR 210). Hamilton timely filed a notice of appeal from the denial of the Rule 60(b) motion on October 26, 1992 (13 CR 210). Accordingly, we have before us three sets of issues: those relating to the validity of the underlying conviction; those relating to the penalty phase of the state

proceedings; and those relating to the denial of the Rule 60(b) motion.

I. Challenges to the Underlying Convictions

A. Shackling

Hamilton contends that the trial court's decision to shackle him during his state criminal trial violated due process. When this matter was before us earlier, we directed that the district court review the state court record and conduct an evidentiary hearing if necessary to determine the merits of this claim. We observed that "[i]ndependent review of the state court record is often vital in habeas petitions, but particularly so in petitions challenging a decision to shackle the defendant through his criminal trial. Shackling is strongly disfavored because of the danger that it may deprive the defendant of the presumption of innocence." Hamilton v. Vasquez, 882 F.2d

at 1471. Citing Wilson v. McCarthy, 770 F.2d 1482, 1485 (9th Cir. 1985), we further observed that shackling is proper "where there is a serious threat of escape or danger to those in and around the courtroom or where disruption in the courtroom is likely if defendant is not restrained." Id.

Upon remand, the district court conducted a thorough review of the state court record and held an evidentiary hearing which included testimony from Hamilton's former counsel, the trial court judge and Hamilton himself. The district court made detailed findings concerning the circumstances surrounding the shackling and the basis for the trial court's decision. Those findings reflect that Hamilton was originally placed in restraints prior to trial at the request of his counsel. The request was based upon Hamilton's sexual assault on

counsel's assistant, and a physical assault on counsel himself. At Hamilton's request, the shackles were removed, and the trial began with Hamilton in a restrictive leg brace under his trousers. At that point, the district court found that Hamilton was on notice that future shackling depended upon Hamilton's conduct both in and out of court.

The leg iron was subsequently removed after Hamilton complained of pain. The trial court inquired about the availability of other types of restraints and concluded that Hamilton should have a chance to start trial without restraints.

The episode which gave rise to further restraint was a verbal assault and violent behavior exhibited toward deputies who were to bring Hamilton from his cell to the courthouse on the third day after jury selection commenced. After a hearing that morning, the trial court found a

pattern of increased agitation on the part of Hamilton and was concerned that he was "on the edge of losing control of himself at any time." The court considered and rejected increasing the number of bailiffs because of their inability to control a sudden outburst. The court also considered removing Hamilton from the courtroom during trial but rejected this alternative because of Hamilton's status as co-counsel. The court ordered Hamilton shackled for trial "with no alternative available."

Hamilton was then placed in handcuffs attached to a chain around his waist. He had a chain placed around his legs. Although Hamilton was seated during trial, the jury was aware of the shackles because he took the stand to testify.

On the basis of these findings, which are fully supported by the evidence, the district court concluded that the trial

court had taken all of the requisite steps to safeguard Hamilton's rights. These included determining on the basis of adequate inquiry that an unusual measure was necessary to preserve security, pursuing less restrictive alternatives, and warning the defendant that disruptive behavior might result in physical restraints. See Illinois v. Allen, 397 U.S. 337, 344 (1970); Jones v. Meyer, 899 F.2d 883, 885 (9th Cir.), cert. denied, 498 U.S. 832 (1990); Spain v. Rushen, 883 F.2d 712, 721 (9th Cir. 1989), cert. denied, 495 U.S. 910 (1990); Tyars v. Finner, 709 F.2d 1274, 1284-85 (9th Cir. 1983). The district court concluded that the shackling did not violate Hamilton's right to due process.

On appeal, Hamilton contends that the facts before the trial judge did not justify shackling. The record as more fully developed in the district court's

evidentiary hearing belies this contention. Hamilton's behavior outside of court and demeanor in court supported the determination that shackling was justified. The record similarly belies the contention that the trial court failed to consider a less restrictive alternative than shackles. Less restrictive alternatives were attempted but failed.

Hamilton contends that he was not properly warned that he might be placed in shackles, but this contention is without merit. Although he was not expressly warned that he would be placed in shackles, the district court found that he was on notice that further disruptive behavior might lead the court to order shackles. This finding is fully supported by the record which shows that Hamilton was shackled only after he himself complained of pain from the leg brace and

expressed his own preference for shackles to the brace.

Finally, Hamilton contends that the district court improperly allowed the trial judge to testify at the evidentiary hearing. This court, in remanding Hamilton's case, instructed the district court to hold an evidentiary hearing if it deemed such a hearing appropriate to supplement the state court record. Hamilton, 882 F.2d at 1473. Cal. Evid. Code § 703.5 bars a judge from testifying at subsequent civil proceedings as an expert about matters before him in his judicial capacity, but it does not preclude a judge from testifying as a fact witness in a habeas proceeding. There is no basis for holding that California state law, much less federal law, was violated by the district court's hearing this testimony. There is, in sum, no basis to overturn the district court's conclusion

that the shackling at trial did not violate Hamilton's due process rights.

B. Ineffective Assistance of Counsel

Hamilton raises a number of contentions relating to the performance of his counsel, Mr. Ryan, at trial. We agree with the district court that none of these contentions, either standing alone or in combination, rise to the level of constitutional violation of the right to effective assistance of counsel. In weighing these contentions, we must bear in mind that in order to demonstrate ineffective assistance of counsel, a habeas petitioner must show that counsel's performance fell below that of a reasonable attorney, and that counsel's errors created a reasonable probability that, but for the errors, the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668,

687, 694 (1984). We deal with each of Hamilton's contentions in turn.

1. Counsel's request that Hamilton be shackled.

Mr. Ryan made a pretrial request that Hamilton be shackled. The request was based principally upon Hamilton's violent attack on Ryan's assistant which, during the hearing before the district court, the assistant described as "life threatening." Ryan himself testified in the district court that the request was also based on earlier episodes of violence and threats. Ryan further informed the trial court that he was concerned that Hamilton would prejudice his own case if he were to behave violently in front of the jury.

It is difficult to conclude that counsel's pretrial request was unreasonable in the circumstances, but even if we were to so conclude, the request could not have affected the

outcome of the trial. This is because Ryan withdrew the shackling request before Hamilton's first appearance before the jury, and Hamilton remained unshackled for six days until the jail outburst against deputies convinced the trial court, over Ryan's objection, that Hamilton should be shackled.

It is true, as Hamilton points out, that the violent episode on October 8 would not in and of itself have justified the shackling, according to the trial judge. Yet, according to the trial judge, Hamilton's demeanor in court also played a large role in the shackling decision. We cannot accept Hamilton's further suggestion that but for Ryan's earlier request for shackling, the trial court would never have known of any other incidents of violence. In considering its options on October 8, the trial court was obligated to become informed of all

relevant circumstances, including any prior attacks by Hamilton of which his counsel was aware. If the court had not already known of the prior relevant behavior it should have inquired. See Jones, 899 F.2d at 885. In short, Hamilton cannot show how he was prejudiced by Ryan's pretrial request for shackling which was withdrawn before the trial began.

2. Failure to investigate and present certain evidence.

Hamilton contends that trial counsel was ineffective because he failed to: (1) investigate and present evidence that the victim was decapitated post-mortem; (2) present an alternative theory as to how the victim's blood appeared on Hamilton's shoe; (3) challenge the prosecution's theory that Hamilton transported the victim's body in her van; and (4) challenge the prosecution's use of

Hamilton's identification of the victim.

a. Decapitation.

The pathologist who performed the autopsy on the victim testified at trial that he was unable to state with certainty whether the victim's head and hands were removed before or after death (42 RT 2337). He did state, however, that the victim was "probably dead" when her hands were cut off (id.).

In this habeas petition, Hamilton claims that his counsel at trial, in order to counter the prosecutor's suggestion that the decapitation might have occurred before the victim died should have argued that the decapitation occurred after death.

The district court determined that counsel was not ineffective in declining to make such an argument. We agree that counsel could have reasonably concluded

that arguing this point might seem to be an effort to trivialize the crime.

b. Blood on the shoe.

Hamilton contends that trial counsel was ineffective because he failed to present an alternative theory as to how the victim's blood appeared on Hamilton's shoe. The prosecution's evidence included Hamilton's shoe, stained with blood that analysis revealed matched the victim's blood type and was different from Hamilton's (51 RT 3112, 3114). The defense theory was that the shoe might have been smeared with the victim's blood through contact with the van's blood-stained carpet, as opposed to contact with the victim herself (59 RT 3906). In support of the theory, the defense expert, Mr. Bell, testified at trial that the blood could have been transferred to the shoe from the carpet (id.). However, he conceded on

cross-examination that there were no carpet fibers present in the blood on the shoe (id.), and the prosecution's expert on rebuttal testified that carpet fibers would have been mixed in with the blood on the shoe if the defense theory were true (60 RT 4018).

At the request of Hamilton's present counsel, Bell conducted an experiment, prior to the district court evidentiary hearing, from which he concluded that it would be possible for blood to have come from the carpet of the van without a transfer of carpet fibers (id. at 38). Bell's experiment did not use carpet samples from the van, which were still available as evidence, and he conceded that the samples he used were "somewhat different from the carpet in the van" (id. at 36). Bell did not use Hamilton's shoes, or a similar type, in his experiment (IX EH 127). In addition, Bell

used blood from a blood bank which had been treated with anticoagulants, so that its clotting capability, consistency and drying time, were different from the victim's blood (id. at 126-27). The district court properly found that Bell's experiment was flawed.

During the evidentiary hearing in the district court, Hamilton attempted to establish that counsel was ineffective in never asking the defense expert whether the shoes could have been stained by the carpet without having the blood mixed with carpet fibers. Because of the flaws in the experiment, however, trial counsel cannot be faulted in failing to pursue such a theory. Moreover, even if the testimony had been presented, in view of the flawed experiment, there is no reasonable probability that the trial outcome would have been different. See Strickland, 466 U.S. at 694. Therefore,

there was no denial of effective assistance of counsel in connection with the blood on the shoe.

c. Transportation of the victim's body.

At trial, the prosecutor argued that Hamilton transported the victim's body in the victim's van. This contention was supported by the large blood stain in the storage compartment of the van and presence of carpet fibers matching the carpet of the van on the victim's stomach and arms.

Defense counsel at trial argued that the body was transported in another car driven by the true killer, noting that tire tracks different from those left by the van were discovered in the area from where the body was recovered.

In the evidentiary hearing in the district court, Hamilton attempted to show that counsel could have made additional

arguments to rebut the prosecution's case. The district court accurately determined that such arguments were also inconclusive. Hamilton has not shown that any additional investigation of this issue would have led to a more credible argument than that made at trial.

d. Hamilton's identification of the victim.

Hamilton contends that counsel was ineffective because he did not challenge the prosecution's use of Hamilton's identification of the victim. AOB 27-28. This claim lacks merit.

When Hamilton was arrested in Oklahoma, he positively identified the victim from a photograph offered by one of the officers, and correctly identified her by her nickname, "Fran" (49 RT 2873). Hamilton also stated that the victim was wearing light-colored jeans and carrying a beige purse the last time he saw her (id.

at 2875-76). A friend of the victim testified that when last seen the victim was wearing tan jeans and carrying a tan purse (41 RT 2151).

Hamilton abandoned this story after the victim's body was recovered. He testified that he concocted the story to avoid being charged with theft of the van (54 RT 3481). Hamilton denied that he had ever seen the victim, dead or alive (id.). Counsel argued at trial that Hamilton knew the victim through the contents of the purse that he found in the van (id. at 3393). Counsel did not specifically attempt to rebut the prosecutor's argument that Hamilton lied when he testified that he had never seen the victim (63 RT 4151-53).

During the evidentiary hearing in district court, Hamilton testified that he was able to identify the victim because there were photographs of her with the

purse, as well as papers indicating that the owner of the van was named Fran (II EH 46-47). Hamilton stated that he came up with the idea that she was wearing light pants because the color of her purse was light (id. at 46). The district court found Hamilton's story to be unworthy of belief (ER 152).

Hamilton has failed to show that counsel's performance was deficient under Strickland. The district court's finding must be upheld unless clearly erroneous, and nothing in the record suggests that this finding is erroneous. Counsel was faced with very strong evidence supporting the prosecution's theory of identification. Counsel's failure to present an incredible story does not constitute ineffective assistance.

C. Denial of Right to Self-Representation

Hamilton contends he was deprived of his right to represent himself in violation of Faretta v. California, 422 U.S. 806, 807 (1975). A trial court must grant a defendant's request to represent himself so long as the request is made knowingly and intelligently. Id. at 835.

The record before the trial court reflects that Ryan was the third lawyer appointed to represent Hamilton. Hamilton complained about his first attorney's efforts to encourage an insanity plea based upon information he had obtained in violation of confidences. The trial court relieved counsel based upon a "breach of faith." After a second lawyer was appointed, the trial court grudgingly agreed to relieve him upon Hamilton's request, but observed that he saw no reasonable grounds to remove counsel.

When Ryan was appointed, the trial court stated that it would not entertain any more requests to relieve counsel for Hamilton because the trial court believed that Hamilton was seeking to delay the trial. The trial court denied several motions to relieve Ryan before trial, including one on the morning of trial. As the district court found, however, these requests were not unequivocal, see Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986), and many were untimely as they were made just before or after meaningful trial proceedings had begun. See United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986).

During the evidentiary hearing, the trial judge and counsel testified that requests for self-representation were not sincere, but were made to delay the trial.

The district court's ultimate finding that Hamilton's attempts to relieve counsel were not expressions of unequivocal desire to represent himself, but were made to delay the trial, is amply supported by the record. Hamilton has not demonstrated that his rights under Faretta were violated.

D. Improper Admission of Evidence

Hamilton challenges the admissibility of certain evidence. The trial court permitted the admission of Deputy Parson's testimony of Hamilton's threatening statements while he was securing Hamilton's chains in prison, on the basis that they were admissible as a spontaneous declaration, not the result of custodial interrogation. By stipulation, the jury was told that Hamilton had purchased a saw, butcher knife and rope while traveling in the victim's van. The trial court also allowed the admission of three

letters written by Hamilton while he was in prison for a prior conviction which demonstrated his fear of prison and willingness to do anything to secure his release (52 RT 3228-30; 3232-36). The trial court ruled that the letters were relevant to show motive under the theory that Hamilton would do anything to avoid returning to prison, including killing the victim, who witnessed his theft of her van (24 RT 324). In addition, the trial court admitted a letter Hamilton wrote where he stated that he knew someone who would kill his attorney and the prosecutor if he were convicted of murder (47 RT 2741). The trial court ruled that the letter was admissible as an attempt to intimidate the prosecution because Hamilton knew that his outgoing mail was being read by prison authorities (id. at 2738).

On appeal, the California Supreme Court held that the admission of the three

letters Hamilton wrote while in prison for a prior conviction was error but it was not prejudicial. People v. Hamilton, 710 P.2d at 990-992. The court upheld the trial court's admission of the other evidence.

Claims of inadmissibility of evidence are cognizable in habeas corpus proceedings only when admission of the evidence violated the defendant's due process rights by rendering the proceedings fundamentally unfair. Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Although the erroneous admission of the three letters presents different questions with respect to Hamilton's claim concerning the penalty phase instruction, these letters did not render Hamilton's guilt phase fundamentally unfair. There has been no showing that the admission of the

remainder of the challenged evidence violated Hamilton's federal rights.

E. Eighteen Day Adjournment

During jury selection, prospective jurors were informed there would be a two-week recess during the winter holidays (26 RT 24, 36, 39, 55; 27 RT 90). On December 18, 1980, the trial court consulted with the jury and learned that at least one juror could not deliberate the week immediately preceding Christmas (65 RT 1). After the jury had deliberated for approximately two and one-half days concerning Hamilton's guilt, the trial court recessed the trial until January 5, 1981 without objection from Hamilton (8 RT 1497).

Hamilton contends that the adjournment violated his right to due process because it was unjustified and the court did not properly admonish the jury. AOB 41. His contention is meritless.

Hamilton relies on People v. Santamaria, 280 Cal. Rptr. 43 (Cal. Ct. App. 1991) to support his claim. In Santamaria, the California Court of Appeal held that the trial court's recess order of eleven days during jury deliberations violated the defendant's right to due process. Id. at 48. In so holding, the court noted that the trial court did not specify the reason for the recess, and there was no indication of any exceptional circumstances which warranted the adjournment. Id.

Hamilton's case is distinguishable from Santamaria because not only was the adjournment pre-planned, but the court also had a legitimate reason to adjourn the trial. Although the court could have been more stern in instructing the jury not to discuss the case, Hamilton has failed to show that the adjournment and the admonition rendered his trial unfair.

See Jammal, 926 F.2d at 919. The holiday recess did not deny Hamilton due process.

II. Challenges to the Penalty Phase

A. The Modified Briggs Instruction on Commutation

Of all the claims raised by Hamilton in this appeal, the most serious relates to the instruction given to the jury during the penalty phase describing the effect of a life sentence without the possibility of parole. Hamilton contends that far from aiding the jury in making a reasoned and informed choice between a sentence of life and death, as due process requires, the instruction given misled the jury as to the likelihood of parole eligibility, encouraged, rather than discouraged the jury from speculating about parole, and distracted the jury from considering relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments.

It is well established that because the punishment of death is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether a death sentence is appropriate in a particular case. See Fetterly v. Paskett, No. 90-35627, slip op. 7203, 7215 (9th Cir., July 9, 1993) (quoting Woodson v. North Carolina, 428 U.S. 280, 303-305 (1976). Thus, the requirements of the Eighth and Fourteenth Amendments dictate that:

> where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). To avoid the "arbitrary and capricious" imposition of the death penalty, the sentencing body's attention

should be directed to the specific circumstances of the crime and the characteristics of the defendant. Id. at 197; see also Zant v. Stephens, 462 U.S. 862, 879 (1983).

In channelling the jury's discretion, however, the Eighth Amendment requires that a sentencing scheme allow the jury to consider all relevant mitigating evidence. In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence. Boyde v. California, 494 U.S. 370, 380 (1990). A penalty phase instruction violates the Eighth Amendment if it prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence, Penry v. Lynaugh, 492 U.S. 302, 319 (1989) or

creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence, Lockett v. Ohio, 438 U.S. 586, 605 (1978). Therefore, we must examine the challenged instruction in light of these exacting standards for fair and informed jury deliberation in death penalty cases. We conclude that due process and the Eighth Amendment's prohibition against cruel and unusual punishment combine to require a new penalty phase trial.

The problems in the case stem from the now repealed provision in California law requiring the trial court to instruct the jury in a capital case that the Governor had the authority to commute a life sentence. The instruction commonly given was known as the "Briggs" instruction[1/], and provided as follows:

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1. The Briggs instruction was incorporated into the California Penal Code as a result of a 1978 voter

> You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

The instruction was controversial from its inception and was considered by the United States Supreme Court in California v. Ramos, 463 U.S. 992 (1983).[2/] The Court held, in the circumstances of that case, that the two-sentence

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initiative. See California v. Ramos, 463 U.S. 992, 995 n.4.

2. The Briggs instruction is no longer given, for in Ramos, on remand, the California Supreme Court found the Briggs instruction to violate the California Constitution's due process clause because "it is seriously and prejudicially misleading and because it invites the jury to be influenced by speculative and improper considerations." People v. Ramos, 689 P.2d 430, 439-40 (Cal. 1984) (Ramos II), cert. denied, 471 U.S. 1119 (1985). The penalty of this case took place before the decision in Ramos.

instruction survived federal constitutional scrutiny.

In upholding the instruction in Ramos, the United States Supreme Court emphasized that the Briggs instruction itself was aimed at accuracy. It intended to correct the inaccuracy of the sentence description under California law as "'life imprisonment without possibility of parole' . . . when, under state law, the Governor possesses authority to commute that sentence to a lesser sentence that includes the possibility of parole." Id. at 1009 (emphasis in original). The necessary corollary of that holding that guides our analysis in this case is that if an instruction is inaccurate or misleading it will not be upheld.

In this case the two-sentence instruction at issue in Ramos did not accurately describe the life sentence which would be imposed on Hamilton and the

instruction given in Ramos was not given in this case. When the state proposed it, defense counsel objected to any Briggs' instruction being given. Defense counsel objected, in part, because in this case, unlike Ramos, the defendant had been convicted of two prior felonies. The Governor in this case, therefore, could not commute a life sentence without possibility of parole to a life sentence with possibility of parole unless at least four of the California Supreme Court justices had given prior approval. See Cal. Penal Code § 4852 (Deering 1992); California Constitution, Article 5 § 8 (Deering 1981). Defense counsel objected to any instruction involving speculation on the possibility of parole and made clear the defense position that if any instruction on parole were to be given it would have to incorporate substantial modification of the Briggs instruction.

The prosecution proposed modifying the two sentence Briggs instruction in order to explain that in Hamilton's case parole could be considered after 25 years had been served on a life sentence, less one-third off for good time credits. This proposal effectively told the jury that if it sentenced Hamilton to life imprisonment without possibility of parole, he would be eligible for parole after serving only 16 years and 8 months in prison. This was incorrect. Hamilton would be eligible for parole only if the sentence were commuted to life imprisonment with the possibility of parole. This fact was not explained in the prosecution's requested instruction to the jury. The proposed instruction was therefore misleading and inaccurate.

The prosecution also requested, as part of the same instruction, language instructing the jury that the subject of commutation, modification, or parole "is

not to be considered by you in determining the punishment for Mr. Hamilton." This was wholly inconsistent with the prosecution's request that the jury be expressly instructed to consider the Governor's power of commutation and when Hamilton would be eligible for parole.

Finally, the prosecution requested a lengthy, "cautionary" addition to the Briggs instruction that the jury not speculate what the various governmental officials would do if the matter of Hamilton's parole were before them; the jury was to assume that the officials would not release Hamilton unless it was safe to do so. This language not only created a negative implication that the officials would not properly perform their jobs, but it invited the jury to assume that the question of Hamilton's release would automatically come before these officials. This too was inaccurate.

The instruction eventually given was cobbled together by the court when it ruled, with the eventual consent of counsel, that it would give the Briggs instruction as modified by all proposals from both sides. The dissent erroneously suggests that defense counsel was satisfied with the resulting instruction, but the record demonstrates that defense counsel wanted no instruction on parole and had to settle for a modified instruction. The result was a confusing pastiche that provided, after the two sentence Briggs instruction itself, as follows:

> This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper

> authorities. You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can safely be released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities.

This instruction is very different from the two-sentence instruction upheld

by the United States Supreme Court in Ramos. That instruction invited no predictions on what the Governor might do, Ramos, 463 U.S. at 1005. In stark contrast, the instruction in this case so focused on the commutation and parole process that speculation was inevitable, and not only about the Governor, but about the state Supreme Court, and parole officials as well.

The United States Supreme Court in Ramos did not permit the jury to speculate about the likelihood of the defendant's release on parole, for it assumed that the trial court would provide the jury with accurate information concerning the likelihood of commutation and parole. Ramos, 463 U.S. at 1004. Furthermore, the Court in Ramos assumed that the instruction did not preclude the defendant from offering any evidence regarding the Governor's power to commute a life

sentence without possibility of parole. Id. However, California case law in effect at the time Hamilton was sentenced prevented defense counsel from showing the actual likelihood of a person ever being paroled if he were sentenced to life imprisonment. See People v. Morse, 388 P.2d 33, 43 (Cal. 1964).[3/]

In fact, although defense counsel was not permitted to present such information, the hurdles standing in the way of parole eligibility were formidable indeed. In California, a person who is a twice-convicted felon such as Hamilton must apply directly to the Governor in order to have his sentence commuted. See Cal. Penal Code § 4802 (Deering 1992). The Governor, upon receipt of the application, must refer it to the Board of Prison Terms for an investigation and

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3. In Morse, the jury was deciding between the death penalty and life with the possibility of parole.

recommendation. Id. After the Board of Prison Terms makes its recommendation, it transfers the application along with the recommendation back to the Governor. See Cal. Penal Code § 4813 (Deering 1992). Even if the Board of Prison Terms recommends commutation, the Governor cannot commute a sentence of life without parole unless four justices of the California Supreme Court recommend commutation. See Cal. Penal Code § 4852 (Deering 1992); California Constitution, Article 5 § 8 (Deering 1981). Furthermore, even if both the Board of Prison Terms and four justices of the Supreme Court recommend commutation, the Governor has the authority to reject the recommendations. California Constitution, Article 5 § 8 (Deering 1981).

The instruction as given incorrectly suggested that if the jury decided to sentence Hamilton to life

without possibility of parole, he would nevertheless be eligible for release. Thus, the jury was invited to speculate that the only way it could avoid Hamilton's likely release was to sentence him to death. The probability of the jury's improper speculation was compounded by the prosecutor's inappropriate assertion in closing argument that Hamilton, if sentenced to prison, would be "conniving and devising ways to manipulate the system and get out." The prosecutor relied on inflammatory and largely irrelevant letters written by Hamilton years earlier showing his fear of prison. The California Supreme Court held that the admission of the letters was error but it was not prejudicial to the guilt phase. People v. Hamilton, 710 P.2d at 990-992. The court, however, inadequately considered the effect of the letters at the penalty phase.

In considering whether a defendant should be sentenced to death, the jury must be able to exercise the "guided discretion," required by the Eighth Amendment, by limiting its penalty deliberations to the characteristics of the defendant and the circumstances of the offense. See Gregg, 428 U.S. at 197. In exercising this discretion, the jury must consider relevant mitigating evidence. See Penry, 492 U.S. at 319. The jury in this case was diverted from this task by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase.

Defense counsel called seven witnesses. They included two of Bernard Hamilton's brothers, his mother, a neighbor and Hamilton's pastor. The jury spent three days deliberating in the penalty phase, suggesting that the

California jury saw this as a close case. See People v. Murthsham, 631 P.2d 446, 371 (Cal. 1988), holding that deliberation of two days in the penalty phase suggested the issue was close. The lengthy deliberation, coupled with the mitigating evidence presented, supports the conclusion that the detailed instruction on the possibility of commutation and parole prevented the jury from properly considering Hamilton's penalty.

In short, the modified instruction given in this case did the very thing that the United States Supreme Court in Ramos said the instruction in that case did not do: the instruction in this case created inaccuracies and confusion. The two-sentence Briggs instruction upheld in Ramos was inapplicable to Hamilton because, unlike the defendant in Ramos, Hamilton was a twice-convicted felon and therefore was subject to different

commutation requirements. The trial court's modifications of the Briggs instruction, however, did not cure the problems created by the inaccuracy; rather, they allowed the jury to impose a death sentence based upon improper assumptions concerning parole eligibility.

We cannot accept the district court's conclusion that the instruction favored Hamilton. The district court stated that the instruction informed the jury that the possibility of parole was "remote." As we have seen, however, the instruction had the opposite effect by suggesting that Hamilton would come before parole authorities in less than 17 years. Hamilton was 30 years old at the time of trial, so the jury could have assumed, based upon the instruction, that there was a likelihood that Hamilton would be released from prison by the time he was 47 if it decided to impose a sentence of life

without possibility of parole. There was, however, no such likelihood. The dissent articulates no reason why the instruction favored the defendant but begs the question by incorrectly assuming the defense counsel wanted the instruction.

The district court, citing Boyde, also relied upon the "absence in the record" of any showing that the jury failed to listen to the trial court's admonition not to consider the possibility of commutation. Boyde, however, requires us to look at the instructions as a whole to determine whether there is a reasonable, objective likelihood that the jury was misled. Boyde, 494 U.S. at 380. Here, where the trial court told the jury not to consider what it had just been instructed were relevant considerations, the jury must have been misled. The admonition to the jury that it should not consider the possibility of events that

had just been described could not cure the error. The jury was required to decide issues of life or death with instructions it could not follow. This is something the Constitution does not permit.

> There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton v. United States, 491 U.S. 123, 137 (1968).

The dissent appears to contend that, under Boyde, there is no constitutional violation unless the defendant proves that the jury has actually used the challenged instruction in an impermissible way. Boyde's standard, although "stringent," is not that stringent. The standard announced by the court in Boyde is whether "there is a reasonable likelihood that the jury has applied the challenged

instruction" unconstitutionally. Boyde, 494 U.S. at 380:

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such inhibition. This 'reasonable likelihood' standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction.

Id.

For the reasons discussed, we have no difficulty concluding that there is a reasonable likelihood that the jury impermissibly applied the modified Briggs instruction.

New penalty phase proceedings are therefore required, and without any Briggs instruction, in light of the intervening clarification of California law. See Ramos II, 689 P.2d at 444 (remanding case

for new penalty phase without Briggs instruction). The jury in this case deliberating under these instructions could not have made the constitutionality mandated reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death.

B. Ineffective Assistance of Counsel

Hamilton contends that his counsel, Mr. Ryan, was ineffective because he did not argue to the jury that it should consider lingering doubt about Hamilton's guilt as a mitigating factor in the penalty phase.

The district court found that Ryan could have reasonably concluded that the jury would not be persuaded by such an argument. We agree.

C. Claimed Violation of Ex Post Facto Clause in California Supreme Court Decision on Remand from United States Supreme Court

The California Supreme Court on direct appeal initially reversed the death penalty, holding that the trial court's failure to instruct that intent to kill was an element of the felony murder special circumstance mandated reversal under Carlos v. Superior Court, 672 P.2d 862 (Cal. 1983). People v. Hamilton, 710 P.2d 981, 995 (Cal. 1985). The United States Supreme Court granted certiorari and vacated and remanded for reconsideration in light of Rose v. Clark, 478 U.S. 570 (1986), which held that harmless error analysis may apply to jury instructions that erroneously shift the burden of proof to the defendant. California v. Hamilton, 478 U.S. 1017 (1986).

Before the remand, however, the California Supreme Court had overruled Carlos. People v. Anderson, 742 P.2d 1306, 1325 (Cal. 1987). On remand of Hamilton's sentence from the United States Supreme Court, the California Supreme Court applied its holding in Anderson and affirmed the death sentence, holding that the instruction was not erroneous.

Hamilton now argues that the Supreme Court's application of Anderson was a violation of the Ex Post Facto Clause of the Constitution AOB 60.

This court has held, however, that retroactive application of Anderson does not offend federal rights where, as here, the conviction occurred before Carlos was decided. Hughes v. Borg, 898 F.2d 695, 705 (9th Cir. 1990); see also Hunt v. Vasquez, 899 F.2d 878, 881 (9th Cir. 1990). Therefore, retroactive application of Anderson is not a violation of

defendant's rights protected under federal law.

III. Denial of the 60(b) Motion

Hamilton appeals from the district court's denial of his Rule 60(b) motion in which he asks the district court to consider a myriad of claims that were not exhausted in the state court until after the district court entered its judgment denying habeas relief on the exhausted claims and which the district court determined on the merits. Hamilton asks us to hold that the district court abused its discretion in denying the 60(b) motion because he was taken aback by the Supreme Court's decision in McCleskey v. Zant, 111 S. Ct. 1454 (1991), holding that petitioners filing subsequent habeas corpus petitions must show cause and prejudice for failing to raise the claims in a first petition for habeas corpus. Hamilton claims that he had relied upon

the pre-McCleskey law permitting more lenient filing of subsequent habeas petitions when he refrained from earlier exhausting the Rule 60(b) motion claims. He maintains it was reasonable for him, before McCleskey was decided, to ask the district court to decide some claims and, only when and if those claims were unsuccessful, proceed to his other claims and bring a subsequent petition.

We would be sympathetic to Hamilton's argument if he had in fact reasonably assumed that all unexhausted claims could be presented without restriction in a subsequent petition. However, in this particular case, it was not reasonable for Hamilton to make such an assumption, because the district court repeatedly warned Hamilton that if he did not exhaust all his claims and present them in a timely manner in his original petition, the district court would deem the

unexhausted claims waived. In these unusual circumstances, we cannot hold that it was an abuse of discretion for the district court to refuse to grant the Rule 60(b) motion and require Hamilton to present those claims in a subsequent petition subject to the strictures of McCleskey.

A more detailed presentation of the chronology reflects not only that Hamilton was repeatedly warned that he should exhaust all claims in order to ensure a full hearing on them, but that Hamilton could, with a brief application to the California Supreme Court, have secured such exhaustion without unduly delaying the district court proceedings.

On March 8, 1990, the district court ordered Hamilton to identify all claims he intended to raise in his habeas petition in accordance with Judge Alarcon's concurrence in Neuschafer v. Whitley, 860

F.2d 1470, 1482 (9th Cir. 1988), cert. denied, 493 U.S. 906 (Alarcon, J. concurring). Hamilton identified 38 claims on June 8, 1990, including the claim that Jesse Moffet might have committed the murder for which Hamilton was convicted. (ER 5). The district court eventually gave Hamilton until October 22, 1990 to either exhaust his state remedies with respect to the identified claims that were unexhausted, or present a habeas petition containing only exhausted claims. The district court was willing to stay consideration of Hamilton's habeas proceeding if he demonstrated that he initiated state proceedings prior to October 22 (ER 19). In its order, however, the district court warned Hamilton that if he pesented only his exhausted claims, he would be subject to abuse of the writ principles if he were to later raise additional claims (id.).

Hamilton chose to raise only the exhausted claims, and did so on October 22.

On April 16, 1991, the Supreme Court decided McCleskey v. Zant, 111 S. Ct. 1454 (1991), which held that a habeas petitioner had to demonstrate cause and prejudice in failing to raise his claims in his first federal habeas petition. On April 23, 1991, Hamilton's evidentiary hearing commenced. On May 9, 1991, at the close of the evidentiary hearing, Hamilton moved to stay the closing of the hearing in light of McCleskey so that he could exhaust state remedies. The district court denied this request. Hamilton asked the court to reconsider this motion on July 1, 1991, which the court denied on August 23. On this date, the court also denied Hamilton's habeas petition. Hamilton filed a motion for reconsideration, which was denied on November 1, 1991.

Hamilton filed a habeas petition in the California Supreme Court on December 30, 1991, raising the unexhausted claims that were identified in his June 8, 1990 filing in the district court. The California Supreme Court denied his petition without citation on February 17, 1992. On March 17, 1992, Hamilton filed a Rule 60(b) motion in the district court. This court ordered a limited remand so that the district court could consider the 60(b) motion. The district court denied the motion.

Hamilton has failed to show excusable neglect for not attempting to exhaust his state remedies between June 8, 1990, and October 22, 1990. Nowhere in his brief does he explain why he could not present his unexhausted claims to the California Supreme Court during this time period. Hamilton complains of the fact that the district court denied his discovery

requests concerning the Moffet claim, but the district court has the discretion to deny discovery in habeas proceedings, particularly for claims that are unexhausted. See Rule 6(a), Rules Governing Section 2254 Cases.

Hamilton's reliance on Coleman v. Vasquez, 771 F. Supp. 300, 303-04 (N.D. Cal. 1991) is misplaced. In Coleman, the district court stayed briefing and granted the petitioner's discovery request in light of McCleskey. Id. at 303-04. However, the petitioner in Coleman had filed his amended habeas petition only seven weeks prior to the McCleskey decision and had not been ordered to present all of his claims in a single petition as Hamilton was. See also Bonin v. Vasquez, No. 92-56299, slip op. 7511, 7513 (9th Cir. July 16, 1993) (affirming denial of 60(b) motion where petitioner was ordered to present all of his claims

in a single habeas petition and failed to do so).

The district court's order denying Hamilton's Rule 60(b) motion was not an abuse of discretion and must be affirmed.

Appellant has submitted a brief pro se. We have reviewed all of his claims and to the extent that they differ from those presented by counsel, they are rejected.

Conclusion

The order of the district court denying Hamilton's Rule 60(b) motion to consider previously unexhausted claims as part of the original habeas petition is AFFIRMED. The district court's denial of habeas relief on Hamilton's claim that the instruction in the penalty phase of the trial violated his Eighth and Fourteenth Amendment rights is REVERSED and the matter is REMANDED to the district court with instructions to order new penalty

phase proceedings. The judgment of the district court is in all other respects AFFIRMED.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

ATTORNEY LISTING

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Pat Zaharopoulos, Assistant Attorney General, San Diego, California, for Respondent-Appellee.

Hamilton v. Vasquez,
Nos. 91-56251 91-56252
91-56295 91-56403
91-80385 93-55039

TROTT, Circuit Judge, concurring and dissenting.

"On May 31, 1979, about 1 p.m., the body of Eleanore Frances Buchanan was discovered in the grass near a cul-de-sac off Pine Valley Road, near San Diego. Harry Piper noticed it while walking back to his car from target shooting. The body had no head or hands and was clothed only in a bra, underpants, and socks. . . . Terry Buchanan, the victim's husband, testified that his wife had given birth to a baby boy three weeks before her death and that she was still nursing him on May 30, 1979." People v. Hamilton, 45 Cal.3d 351, 357-58 (1988).

For this kidnapping and killing during which Bernard Lee Hamilton brutally took Eleanore Buchanan's life, Terry

Buchanan's wife, and their son's mother, Hamilton has been convicted of murder and sentenced to death. I am unable to identify any Constitutional infirmity either in his conviction or his sentence.

I

The Supreme Court has validated the practice of inviting jurors in the penalty phase of a state death penalty case to consider in their deliberations that a sentence of life without possibility of parole is really a sentence of life with possibility of commutation. California v. Ramos, 463 U.S. 992 n.19 (1993). In approving this practice, the Court specifically determined that a jury instruction containing such information is compatible with the Eighth and Fourteenth Amendments. Notwithstanding the Court's definitive holding on this issue, the majority conclude that providing a jury with such information in this case

violates the Constitution, even though the jury was told to disregard that information in arriving at its verdict, and even though the California Supreme Court has analyzed the effect of the admonition to disregard and concluded that it was effective. In so holding the majority rely on arguments made and rejected in Ramos. I do concur in the majority opinion to the extent that it affirms (1) the district court's denial of the Rule 60(b) motion, and (2) the district court's denial of relief on the merits of Hamilton's claims concerning the validity of the underlying convictions. I respectfully dissent, however, from the majority's decision to reverse the district court's denial of habeas relief as to Hamilton's sentence and to remand with instructions to order a new penalty phase for the petitioner. I do so because I am convinced that the majority opinion

exceeds our authority under habeas corpus.

II

A.

My disagreement with the majority's analysis as to the validity of Hamilton's death sentence is essentially twofold. First, I believe generally that the majority's analysis of the disputed commutation instructions is so entangled with concerns about purely state law matters that it trespasses on the Supreme court's admonition that "`federal habeas corpus relief does not lie for errors of state law.'" Estelle v. McGuire, 112 S. Ct. 475, 480 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1990). The question as I see it is only whether the disputed instruction violated Hamilton's federal Constitutional rights, particularly his Fourteenth Amendment right to due process of law and his rights under the Eighth Amendment, not whether

the Briggs instruction violated the California Constitution, or whether the instruction was completely accurate as to California's commutation requirements, or what a twice-convicted felon must do to have his sentence commuted.

Second, I do not believe the disputed jury instruction did violate any of Hamilton's federal Constitutional rights. The majority opinion is correct that the disputed instruction in this case is different from the Briggs Instruction approved in Ramos. After studying Ramos, however, I do not believe the differences are Constitutionally significant. This is a classic case of differences being insufficient to create a viable legal distinction. However, even if I start from the majority's position that there is something possibly distracting about part of the disputed instruction, I am unable

to conclude that it infringed on Hamilton's Constitutional rights.

In summary, I respectfully believe the majority opinion inappropriately magnifies state law technicalities into a federal Constitutional infirmity. Compare Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) (allegation of misapplication of state sentencing law held to raise a federal Constitutional issue).

B.

In Boyde v. California, 494 U.S. 370 (1990) the Supreme Court set out the standard by which we evaluate disputed instructions in this context. When an instruction is assailed as ambiguous and subject to an erroneous interpretation, the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id.

at 380 (emphasis added). In so mandating, the Court rejected lesser formulations such as what a reasonable juror "could have" or "would have" done in the shadow of the disputed instruction, as well as whether there was a "substantial possibility that the jury may have rested it verdict on the "improper ground."'" Id. at 379. Instead, the Court chose a test which Justice Marshall acknowledged in dissent to be "stringent," albeit unduly so in his judgment. Id. at 387 (Marshall, J., dissenting); see also Cupp v. Naughten, 414 U.S. 141, 146 (1973) ("'[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [Constitutional right].'" (quoted in Estelle v. McGuire, 112 S. Ct. 475, 482 (1991); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))). In explaining the

application of the new test, the Court explicitly repudiated conjecture about the behavior of the jury as a basis for overturning a verdict, evoking the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." Boyde, 494 U.S. at 380.

The Court likened its new test to exacting tests applicable to other inquiries:

> In other contexts, we have held that a defendant cannot establish a constitutional violation simply by demonstrating that an alleged trial-related error could or might have affected the jury. To establish that ineffective assistance of counsel violates the Sixth Amendment, for example, a defendant must show a "reasonable probability that, that but for counsel's unprofessional errors, the result of the proceeding would have been different." Deportation of potential defense witnesses does not violate due process unless "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of

> fact." And failure of the prosecution to disclose allegedly exculpatory evidence to the defense violates due process "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." To receive a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence would more likely than not lead to a different outcome.

Id. at 380 n.4 (citations omitted). These analogies inform our judgment as we perform our task in this case, as does the Court's statement that "we 'have defined the category of infractions that violate "fundamental fairness" very narrowly.'" Estelle, 112 S. Ct. at 482 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

C.

In assessing the effect of a challenged jury instruction, the rule is that it "'may not be judged in artificial isolation, but must be viewed in the

context of the overall charge.'" Boyde, 494 U.S. at 378 (emphasis added) (quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)). The majority opinion looks only at part of the charge. Reading the charge as a whole in light of the record convinces me there is no reasonable likelihood the jury applied the challenged instruction in a way that prevented the consideration of Constitutionally relevant evidence. I set forth in an appendix to this opinion the complete charge to the jury. The following excerpts from the jury instructions, many of which are completely ignored in the majority opinion, convince me that the jury focused on the evidence, the mitigating factors, and the aggravating factors, not some extraneous matter:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of

the trial of this case (emphasis added).

You shall take into account and be guided by the following factors, if applicable: [followed by a statement of the possible aggravating and mitigating factors in the case].

I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. <u>These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as a basis for deciding that the death penalty would be an appropriate punishment in this case</u> (emphasis added).

Before you consider any fact as an aggravating circumstance, you must find that <u>fact</u> has been established by the <u>evidence</u> beyond a reasonable doubt (emphasis added).

In order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances.

You are now instructed, however, that the matter of a <u>possible commutation or</u>

> modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the governor, the Supreme Court, and those officials charged with the operation of our parole system perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can safely be released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of the doubt that the governor and other officials will properly carry out their responsibilities (emphasis added).

The Supreme Court has already told us that the first two sentences of the disputed instruction do not offend the

Constitution. See California v. Ramos, 463 U.S. 992 (1983). The Court could find no Constitutional infirmity in telling jurors that a sentence of life without possibility of parole is really a sentence of "life imprisonment with possibility of commutation." See id. at 1005 n.19. The Court concluded: "[T]he Briggs Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process. It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation." Id. at 1013. If telling a jury about a governor's power to commute or modify a sentence of life without possibility of parole does not violate the Constitution, I do not understand how adding marginal information about what happens under state

law to twice-convicted felons and about minimum incarceration time changes the diagnosis. If anything, the added language the majority opinion finds offensive works in Hamilton's favor when compared to the basic Briggs Instruction because it adds significant legal impediments to any possibility that Hamilton might ever be freed of a life sentence. In this respect, I agree with our respected colleague on the district court. Judge Brewster said in his impressive 93-page opinion: "Most importantly, the modifications agreed to by the parties improved the unmodified Briggs Instruction from the defense perspective. In this regard, it should be noted that the impetus behind the modification <u>came from petitioner's trial counsel</u>, who was seeking to mitigate the impact of the unmodified Briggs Instruction." <u>Hamilton v. Vasquez</u>, Nos.

86-2101-B & 90-0291-B, at 79 (S.D. Cal. Aug. 23, 1991) (order denying petitions for writ of habeas corpus) (emphasis added).

There is an interesting twist to this issue. On remand from the United States Supreme Court in the Ramos case, the California Supreme Court held that the Briggs Instruction violated California's constitution. People v. Ramos, 37 Cal. 3d 136, 153 (1984), cert. denied, 471 U.S. 1119 (1985). In his second appearance before the California Supreme Court, Hamilton then argued on the basis of the new Ramos decision that the use of the now-defunct Briggs Instruction in his case should entitled him to a new penalty phase trial. Not so, responded Justice Mosk for the same court that had recently rejected the Briggs Instruction. Why? Because language in the disputed instruction in Hamilton's case, unlike the Briggs

Instruction in Ramos, told the jurors not to consider commutation or modification of any life without possibility of parole sentence. In answer to Hamilton's argument that the admonitory supplemental language did not cure the state law problem created by the now-defunct Briggs Instruction, but rather led the jurors to indulge in irrelevant and improper speculation, the California Supreme Court tendered a good and sufficient answer which the majority opinion rebuffs in its analysis: "The clear meaning of the plain words of the admonition . . . refutes this argument." People v. Hamilton, 45 Cal. 3d 351, 375 (1988), cert. denied, 488 U.S. 1047 (1989). Not only does this answer make sense on its face, but it is consistent with the long-standing principle neglected in the majority opinion that jurors are presumed to follow admonitory instructions given by the court

unless the information they are ordered to disregard posed a "substantial threat" to a defendant's constitutional rights. See Bruton v. United States, 391 U.S. 123, 137 (1968). See also Estelle, 112 S. Ct. at 483-84 (relying on limiting language to "guard[] against possible misuse of [an] instruction)." Informed by the Supreme Court's decision and analysis in California v. Ramos, I do not find such a substantial threat in this case. The prosecutor's isolated remark during argument does not change this analysis. I agree with Judge Brewster that the remark was of no moment. See Boyde, 494 U.S. at 384 (arguments of counsel do not generally decrease impact of jury instructions).

The opinion of the California Supreme Court notwithstanding, the majority opinion claims the prosecutor requested the jury be told "to consider the Governor's power of commutation" and

Hamilton's "eligibil[ity] for parole" (emphasis added). This claim is misleading. State law controlling at the time of trial required the judge to give the Briggs Instruction to the jury. The prosecution expressly asked the trial judge to tell the jurors not to consider this subject when determining Hamilton's punishment. More importantly, however, there is simply no Constitutional infirmity in "inviting capital sentencing juries to consider the commutation power in its sentencing decisions." Ramos, 463 U.S. at 998 n.8. This is not my claim; it is the precise holding of the Supreme Court in Ramos. Footnote 8 of Justice O'Connor's opinion makes this point irrefutable. Even if the prosecutor had asked the jury to consider the Governor's commutation power, no federal Constitutional right would have been implicated.

Nevertheless, it is not true, as the majority opinion claims, that "the jury was invited to speculate that the only way it could avoid Hamilton's likely release was to sentence him to death." On this point, I respectfully believe the majority opinion simply refuses to acknowledge the full language of the charge.

D.

There is an aspect of this case that may escape my colleagues' understanding. As Justice Richardson observed in his dissent in People v. Ramos, 30 Cal. 3d 553 (1982), rev'd, 463 U.S. 992 (1983), "jurors already know of the commutation power." Id. at 604 (Richardson, J., dissenting). This observation was reiterated by Justice O'Connor in California v. Ramos, 463 U.S. 992, 996 n.6, 1004 n.19 (1983). This perception of public awareness about commutation is both accurate and important in understanding

the pivotal issue in this case, and it distinguishes this case from Bruton, where the concern was related to confessions and admissions, not matters of common knowledge.

The commutation power was the subject of great public debate in California during the late 1970s, a debate that culminated in a 1978 voter death penalty initiative popularly known as the Briggs Initiative. What happened in this case is simple: the jurors were appropriately told not to consider something they probably all knew about, the Governor's power to alter a murderer's sentence. The trial judge, in an apparent attempt to eliminate possible trouble on appeal, wisely tried to eliminate the commutation factor from consideration. This admonition is akin to telling jurors not to use information they may have read in the newspapers in arriving at a verdict,

an admonition that occurs daily in our courts. Contrary to the approach taken by the majority here, no one could seriously argue that such an admonition about media publicity invites the jurors to do what they are told not to do. Yet in this context such an argument carries the day.

To reiterate, I agree with the California Supreme Court's bottom-line conclusion: Any problems with the substance of this instruction were erased by its admonitory component.

E.

There is a strong indicator that my analysis is correct: Hamilton's counsel consented to the instruction and suggested much of its language. Judge Brewster entered a finding of fact that "the parties reached an agreement on a modified Briggs Instruction." Hamilton, at 77 (order denying petitions for writ of habeas corpus). The majority opinion

admits this fact but ignores its implications. It is difficult to conclude from this record that Hamilton's counsel, who was on the scene and familiar with the case and the evidence, could have believed this instruction would prevent the jury from giving a reasoned moral response to petitioner's mitigating evidence, see Perry v. Lynaugh, 492 U.S. 302, 319 (1989), or that the instruction would create the risk the death penalty would be imposed despite evidence which would call for a life sentence, see Lockett v. Ohio, 438 U.S. 586, 605 (1978). Why is it so clear to the majority that this instruction spelled doom for Hamilton when it was acceptable to his attorney? This question almost answers itself. The instruction was not threatening to those present at the trial because, and I repeat, the jury was told not to consider the information which is now causing all

the trouble. Hamilton's counsel's performance in this case was extraordinary. In his finding of facts, Judge Brewster adopted the trial judge's observation: "Mr. Ryan did an excellent job in a most difficult case with a very, very difficult client." Hamilton, at 41 (order denying petitions for writ of habeas corpus). The trial judge and the trial lawyers were comfortable with the idea that the jurors would do as told. This should tell us something.

F.

The majority opinion persistently does what Boyde tells us not to do: it speculates at every turn. Moreover, the conclusion the majority draws from its speculation are patently inconsistent with the evidentiary dimensions of the case. The opinion says, "[t]he jury spent three days deliberating in the penalty phase, suggesting that the California jury saw

this as a close case." Why so? Why doesn't the length of deliberations suggest the jurors were conscientious and careful and that they followed the instructions as a whole rather than jumping to a rash conclusion? Why doesn't it suggest the jurors did consider the seven mitigating witnesses called by Hamilton?

A close case? Each juror was convinced beyond a reasonable doubt that death was the proper penalty. This hardly sounds like a close case. Any time twelve jurors each agree on an issue, and do so beyond a reasonable doubt, it "suggests" the prosecutor's case was overwhelming. This is surely so in the light of all the evidence in the record, especially the atrocities Hamilton committed upon Mrs. Eleanore Buchanan, who was still nursing the baby boy to whom she had given birth just three weeks before Hamilton

slaughtered her. Mrs. Buchanan's severed head and hands--removed with both a saw and a knife--have never been found. The terror she must have suffered after being kidnapped and falling prey to Hamilton is unspeakable. Even to the most hard-bitten observer, Hamilton's atrocities as demonstrated in the record are monstrous. Against this backdrop, the weak mitigating evidence cited by the majority fades into utter insignificance. In actuality, however, it is impossible for us to know what three days of deliberations signifies, if anything. Thus, I would prefer to ignore altogether the length of the deliberations, rather than use it as the basis for what appears to be a makeweight argument.

Conclusion

Applying Ramos, Boyde and Bruton to this case and to the charge to the jury as a whole convinces me that Hamilton's

federal Constitutional rights were not trammelled by the disputed instruction. The majority's opinion fails to heed the Supreme Court's lead in Ramos. In particular, I point to the Supreme Court's statement that "we find unpersuasive the suggestion that the possible commutation of a life sentence must be held constitutionally irrelevant to the sentencing decision and that it is too speculative an element for the jury's consideration." Ramos, 463 U.S. at 1001-02. All the majority opinion has succeeded in doing is to show what could have done with the disputed instruction, not that the "jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380 (emphasis added). As I pointed out earlier in this opinion,

the "could have" test has been soundly rejected by the Supreme Court.

It is both unnecessary and wrong to use the power of federal habeas corpus to require this case again to go to trail fourteen years after Eleanore Buchanan was butchered. Hamilton was entitled to a fair trial, not a perfect one: he got that to which he was entitled. The record convinces me there is no reasonable likelihood the jury applied the challenged instruction in a way that interfered with a Constitutionally proper determination of his penalty. The conclusion of the California Supreme Court on this point is unassailable. Put another way, even assuming actionable error, I do not believe it "`"had substantial and injurious effect or influence in determining the jury's verdict."'" Brecht v. Abrahmson, 113 S. Ct. 1710, 1716 (1993) (citations omitted). Hamilton earned this

penalty based on (1) his barbaric conduct, (2) the extreme weight of the aggravating factors, and (3) the insignificance of the mitigating factors in his favor. Thus, I respectfully dissent from that part of the majority's opinion overturning his sentence.

Appendix

The complete charge to the jury in the penalty phase:

The Court: All right. Ladies and gentlemen, at this time I have the instructions for the second phase of these proceedings.

The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under special circumstances has been found to be true. It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole. In any case in which the special circumstances charged in this case have been found to be true. Under the law of this state you must now determine which of said penalties shall be imposed on defendant. In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall take into account and be guided by the following factors, if applicable:

A. The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

B. The presence or absence of criminal activity by the defendant which involves the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

C. The presence or absence of any prior felony conviction.

D. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

E. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

F. Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or expectation for his own conduct.

G. Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

H. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects [sic] of intoxication.

I. The age of the defendant at the time of the crime.

J. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

K. Any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

In weighing the aggravating and mitigating factors you are to not merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole.

I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as a basis for deciding that the death penalty would be an appropriate punishment in this case.

The mitigating circumstances which I have read for your consideration are give to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence on Mr. Hamilton. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death penalty. Before you consider any fact as an aggravating circumstance, you must find that that fact has been established by the evidence beyond a reasonable doubt. You may not consider any fact as a reason for choosing to impose the death sentence unless you are satisfied beyond a reasonable doubt and to all certainty that that fact is true.

Reasonable doubt is defined as follows: it is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt.

It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

In order to impose a death sentence, you must be convinced beyond a reasonably doubt that the totality of the aggravating circumstances outweigh the totality of the mitigating circumstances. If you are not convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment without possibility of parole.

The next couple of instructions deal with robbery and battery, since there was evidence of robbery and battery in the penalty phase of the trial, and so I will give you the definitions of these offenses.

The crime of robbery is the taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear.

In order to prove the commission of the crime of robbery, each of the following elements must be proved: one, that a person had possession of property of some value, however slight; two, that such property was taken from such person or from his immediate presence; three that such property was taken against the will of such person; four, that the taking was accomplished either by force or fear or intimidation or by both, and five, that

such property was taken with the specific intent permanently to deprive such person of the property.

Now, relative to the subject of battery, every person who willfully and unlawfully uses any force or violence upon the person of another is guilty of battery, a misdemeanor. As used in the foregoing instruction, the words "force" and "violence," are synonymous and mean any wrongful application or [sic] physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark, and even though only the feelings of such person are injured by the act.

The slightest unlawful touching, if done in an insolent, rude or an angry manner, is sufficient.

It is not necessary that the touching be done in actual anger or with actual malice. It is sufficient if it was unwarranted and unjustifiable.

The touching essential to a battery may be a touching of the person, or the person's wearing apparel or of something attached to or closely connected with the person.

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole shall be imposed on Mr. Hamilton

You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of a crime. Under this power,

a governor may, in the future, commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

This is subject to the requirement that in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years, less one-third off for good time credit before parole may be considered by the proper authorities.

You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur.

It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive.

If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the governor, the Supreme Court and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled

unless he can be safely released into society.

It would be a violation of your duty as jurors if you were to fix the penalty at death because of the doubt that the governor and other officials will properly carry out their responsibilities.

After having heard all of the evidence and after having heard and consider [sic] the arguments of counsel, you shall consider and take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole.

You shall now retire and select on of your number to act as foreman, who will preside over your deliberations.

In order to make a determination as to the penalty, all jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided, and then you shall return with it to this courtroom.

I have two forms which are self-explanatory. One form would provide the penalty would be fixed at death, the other form provides for a penalty of life imprisonment without possibility of

parole, and when you have reached a verdict, all 12 of you have reached a verdict, have the foreman sign and date the verdict and return to this courtroom.

Supreme Court, U.S.
FILED

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No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

APPENDICES (VOLUME II) TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Filed Aug. 23, 1991

BERNARD LEE HAMILTON, Petitioner, vs. DANIEL VASQUEZ, Warden of San Quentin and DANIEL LUNGREN, Attorney General of the State of California, Respondents.	Civil No. 86-2102-B Consolidated with Civil No. 90-0291-B ORDER DENYING PETITIONS FOR WRIT OF HABEAS CORPUS; FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon remand from the Ninth Circuit Court of Appeals, and after reviewing the entire record and conducting an evidentiary hearing, it is hereby ordered that the amended and consolidated petitions for writ of habeas corpus are denied.

I. STATEMENT OF THE CASE

On March 2, 1981, petitioner was sentenced to death for the murder of

Eleanor Buchanan.[1/] On direct appeal, and upon remand from the United States Supreme Court, the California Supreme Court affirmed the judgment of death. People v. Hamilton, 45 Cal.3d 351 (1988) (Hamilton II), cert. denied, 488 U.S. 1047 (1989).

A. Federal Habeas Petitions

Through March, 1990, petitioner filed five separate petitions for writ of habeas corpus in federal court, raising exhausted, unexhausted, and repetitive claims.

1. Petition Number One: 86-0809-T

In his first petition, filed on April 2, 1986, petitioner raised claims relating to ineffective assistance of counsel,

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1. The basic factual circumstances of the crime and the case against petitioner are described in People v. Hamilton, 41 Cal.3d 408, 413-19 (1985) (Hamilton I), vacated, 478 U.S. 1017 (1986). Those facts which are relevant to this court's analysis of petitioner's specific habeas claims are set out below as Findings of Fact.

denial of the right to self-representation, and denial of due process. The district court denied the petition on the merits on August 26, 1986. On appeal, the Ninth Circuit vacated the judgment as premature because petitioner had not exhausted state remedies. The district court was instructed to dismiss the petition without prejudice to refiling the claims following exhaustion, which it did on September 30, 1987.

2. Petition Number Two: 86-2101-B

The second petition, filed on October 9, 1986, charged that the shackling of petitioner at trial was unconstitutional. This court denied the petition on the merits on November 19, 1987. The Ninth Circuit remanded the case for further proceedings on August 23, 1989, instructing the court to examine the entire trial court record. Hamilton v.

Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989). This petition is resolved in this order.

3. Petition Number Three: 88-1148-B

The third petition raised the same issues asserted and dismissed without prejudice in 86-0809-T. This court dismissed the petition on August 31, 1988. On September 7, 1990, the Ninth Circuit dismissed petitioner's appeal, finding it moot in light of the previous ruling in Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989).

4. Petition Number Four: 89-0993-B

The fourth petition was filed on June 20, 1989, in the Norther District of California. This petition raised claims relating to access to the prison law library, denial of effective assistance of counsel, denial of a fair trial, and

denial of due process. Upon transfer to this district, the petition was dismissed on July 19, 1989, as this court concluded that the asserted grounds for relief "either have been or should have been presented by previous petitions . . . ." See Order, July 19, 1989.

5. Petition Number Five: 90-0291-B

The fifth petition states the same allegations contained in the first and third petitions, and was amended on October 18, 1990. This petition has been consolidated with 86-2101-B and is resolved by this order.

B. Consolidation of Federal Petitions

On February 26, 1990, upon motion of respondent and after remand of 86-2101-B, this court ordered petitioner to inform the court within ninety days of any and all additional habeas claims of which he

was aware. See Order, March 6, 1990. In response to this order, on June 8, 1990 petitioner filed a list of 36 potential claims, including claims which had been raised in earlier state and federal petitions. Petitioner conceded that many of the claims identified in his response were unexhausted pursuant to Rose v. Lundy, 455 U.S. 590 (1982).

On June 8, 1990, in order to allow petitioner to bring all appropriate claims in federal court at one time, this court consolidated the petitions pending in 86-2101-B and 90-0291-B, and permitted petitioner until August 8, 1990 to exhaust all unexhausted claims in state court. See Order, June 21, 1990. The consolidated cases were stayed to permit the exhaustion of any unexhausted claims in state court. Id. To the extent petitioner filed new claims in state court, this court indicated that it would

allow petitioner to amend his federal petition with respect to any newly exhausted claims upon completion of the state court proceedings. Id. On August 2, 1990, at petitioner's request, this court extended the time by which plaintiff was to file unexhausted claims in state court from August 8, 1990 to August 20, 1990. See Order, August 17, 1990.

On August 21, 1990, petitioner stated that he had failed to file any identified and unexhausted claims in state court in response to this court's instruction. However, instead of deeming all such claims waived, this court granted petitioner a further extension until October 22, 1990 to file any additional unexhausted state claims with the state court, and any additional exhausted

federal habeas claims in federal court. See Order, September 18, 1990.[2/]

Further, this court stated that if petitioner did seek to exhaust any claims in state court, consideration of the consolidated federal habeas corpus petitions would be stayed until all of the state claims were exhausted. Id. However, petitioner was explicitly notified that on October 22, 1990, without further court order, he would be deemed to have waived and abandoned any and all (1) habeas corpus claims not yet filed in state court; and (2) habeas corpus claims that have been exhausted in state court,

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2. This order was incorrectly captioned with respect to the respondents' identity and the case number. The court issued a nunc pro tunc order on October 15, 1990, rectifying the error. Petitioner has never claimed any prejudice as a result of this error, and it is clear that all parties were aware that the order, although miscaptioned, applied to the pending consolidated cases.

but not yet filed in federal court. Id. at para. 3.

In ordering the above procedure, this court declared that it was seeking to avoid seriatim petitions and the delay which the filing of such petitions regularly introduces into the federal habeas system. At the same time, the court sought to ensure that petitioner was not forced to sacrifice any viable claims, and therefore petitioner was afforded every opportunity to exhaust his state claims and consolidate his federal petition.[3/] See Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988) (Alacron, J., concurring), cert. denied sub nom.

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3. Cumulatively, petitioner has had nearly eight months, from February 26, 1990 through October 22, 1990, to exhaust, amend, and consolidate his claims. If at any time during that period petitioner has filed unexhausted claims in state court, this court, as previously stated, would have stayed the federal proceedings until such claims were exhausted.

Demosthenes v. Neuschafer, 111 S.Ct. 1454 (1991).

On October 18, 1990, petitioner, acting on his own behalf, filed an amendment to his previously filed petition in Case No. 90-0291.[4] On October 22, 1990, petitioner's appointed counsel filed an amended consolidated petition for writ of habeas corpus, encompassing numerous claims raised in the earlier petitions. Neither petitioner nor his counsel filed any unexhausted claims with the state court. By order dated November 21, 1990, this court accepted both documents as timely, and ruled that petitioner had now voluntarily, knowingly, and intentionally

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4. Under the circumstances of this case, the court determined that it would be appropriate to allow petitioner to maintain an in propria persona role even though he has been represented throughout the proceedings by competent appointed counsel. The court's rationale in this regard is discussed below in Section X, Findings of Fact 124-26.

waived and abandoned any and all habeas claims not yet filed in state court, and any exhausted claims not yet filed in federal court, in accordance with this court's order of September 18, 1990.

After respondents answered the petitions and petitioner and his counsel filed their respective traverses, this court conducted a three week evidentiary hearing on all appropriate claims asserted by petitioner. Petitioner was transported to this court from San Quentin, was allowed to confer regularly with counsel throughout the evidentiary hearing, and testified at length during said hearing. At the conclusion of the hearing, both sides waived oral closing argument, choosing instead to file post-hearing briefs.

Upon careful consideration of the amended and consolidated petitions, the entire trial record, the evidence received

during the evidentiary hearing, and the post-hearing briefs, this court now enters the following findings of fact and conclusions of law.

II. THE SHACKLING OF PETITIONER AT TRIAL

A. Findings of Fact

1. On Thursday, September 18, 1980, prior to the start of trial, petitioner's trial counsel, Thomas Ryan, informed Judge Gill in a closed hearing that the had requested that petitioner be placed in restraints by courthouse security personnel. 21 R.T. 154.[5/] Petitioner was present in restraints. In explaining this request, Ryan informed the court of two separate incidents in which

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5. R.T. refers to the transcript prepared below during petitioner's trial proceedings, and P.H.T. refers to the transcript of the preliminary hearing. E.H. refers to transcripts of the evidentiary hearing conducted by this court. Volumes within the R.T. and P.H.T. series are identified by cardinal numbers, and volumes within the E.H. series are identified by roman numerals.

petitioner had acted violently towards members of his defense staff. Id. at 157.

2. The first such incident occurred on Sunday, September 7, 1980, when petitioner attacked Patricia Robinson, who had been retained by Ryan to assist with jury selection. Id. The attack occurred in the interview room in the jail, while Robinson was meeting with petitioner. Id. at 157. During the hearing on September 18, 1980, Robinson stated that "it was a physical attack on me . . . ." Id. at 162. Robinson noted that she believed the purpose of the attack was "to stall the trial . . . and to provide some excuse so that he would not have to assume responsibility of being in attendance at trial." Id. In stating her beliefs as to petitioner's motivations, Robinson did not downplay or seek to minimize the actual physical nature of the attack.

3. The second incident related to the court occurred on Wednesday, September 17, 1980, when Ryan met with petitioner in the interview room at the jail. Id. at 158. Petitioner handed Ryan a letter, and while Ryan was putting the letter into his briefcase, petitioner punched Ryan in the face, knocking him to the floor. Id. With Ryan on the ground, petitioner simply left the room. Id.

4. In addition to the two incidents described above, Ryan also informed Judge Gill on September 18, 1980, of his belief "that [petitioner] would disrupt the proceedings not only in the jail as he did by hitting me, but that he would disrupt the proceedings in the trial court by either hitting me or some member of the staff or judge . . . ." Id. at 159.

5. Petitioner was allowed to relate his version of the subject incidents. Petitioner claimed that he was not seeking to delay the trial, but had merely grown frustrated with what he perceived to be the deteriorating attorney-client relationship between himself, Ryan, and co-counsel Vivian Camberg. Id. at 163-65. Petitioner did not deny that the incidents took place.

6. At the conclusion of the hearing on September 18, 1980, Judge Gill took no explicit action, and did not order the shackles removed. Id. at 166-69.

7. On Wednesday, September 24, 1980, the parties appeared before the trial judge, the Honorable Franklin B. Orfield, to argue in limine motions. No jury was present. Because of the request made by Ryan on September 18, 1980, petitioner appeared in shackles. 72 R.T.

1. Upon petitioner's request to be unshackled so that he could handle his papers and take notes during the proceedings, Ryan again interjected his belief that the restraints should remain on petitioner. Id. at 1-2. In order to resolve this issue at the outset, the court reconvened the proceedings in camera and excluded the prosecutors. Id. at 2.

8. During the in camera hearing, Ryan informed the court of petitioner's earlier attacks, and his belief that petitioner "might very well impulsively, without thinking about it, either attack me, the court clerk, Miss Camberg, or anyone." Id. at 4.

9. The court allowed petitioner to state his position relative to shackles, and petitioner noted that he was co-counsel in this case, "not simply a defendant trying to take notes and stuff." Id. at 5. Petitioner further observed

that he had appeared in court on numerous occasions and had not acted inappropriately during any of those appearances. Id. In addition, petitioner stated his understanding that any in-court outbursts would be counterproductive to his defense. Id. at 6.

10. Although petitioner stated that he had not engaged in any prior courtroom outbursts, he was unable to state categorically that such outbursts might no occur in the future, observing, "As a matter of fact, why should there be [an outburst] unless Mr. Ryan is conducting himself in a manner that he realizes he shouldn't. Any why should he worry about that?" Id. at 5-6. Viewed in the context of petitioner's mounting frustration and apparent inability to control himself, this court finds that this statement constituted a veiled threat by petitioner to act violently in the

courtroom should his displeasure with Ryan reach a level known only to him.

11. After hearing from Ryan and petitioner, Judge Orfield ruled that petitioner would remain shackled. Id. at 9. Because of petitioner's potential for acting violently in court, Judge Orfield specifically stated that he was concerned with the safety of Ryan, Camberg, the court clerk, the court reporter, and any other officers of the court. Id. at 8.

12. On Thursday, October 2, 1980, Judge Orfield conducted a second in camera hearing on the shackling issue, during which Ryan requested that the shackles be removed from petitioner. Id. at 31. In making this request, Ryan stated that further conversations with petitioner and with other defense attorneys in the community had caused him

to reconsider his original request that petitioner be shackled. Id. at 30-31.

13. During the in camera hearing on October 2, 1980, Ryan also further expounded on his reasons for initially requesting that petitioner be shackled, informing Judge Orfield for the first time that Robinson had related to Ryan statements by petitioner indicating that "he would disrupt the trial; that he would make an attack on either myself or the bailiff, or perhaps even the judge." Id. at 32.

14. As an alternative to shackling, Ryan informed the court "that there are knee-type restraints that can be worn under Mr. Hamilton's trousers that would not be apparent, that would provide some security." Id. at 34.

15. In considering the request that petitioner be unshackled in court, Judge Orfield ordered bailiff

Andrus to investigate with jail authorities "if there is any reason that they know of why, from a security standpoint, we shouldn't release the shackles, and if there is not, I will order that they be released." Id. at 36. As this passage indicates, petitioner was put on notice by Judge Orfield that his general demeanor, both in and out of court, would be important in determining the security risk posed by petitioner while in court. In other words, this court finds that petitioner figuratively possessed the key to the shackles, and was aware that he controlled his own destiny relative to shackling.

16. Approximately thirty minutes later, Judge Orfield announced in open court that petitioner would be unshackled and would wear a leg brace. 26 R.T. 2. With petitioner in a restrictive leg brace under his trousers, jury

selection commenced later in the afternoon, and at the end of the day the court recessed until Monday, October 6, 1980. Up to this point, petitioner had never been seen by an prospective jurors in any form of restraint.

17. On Monday, October 6, 1980, Ryan interrupted jury selection to inform the court, out of the hearing of the jury, that petitioner "would rather have the leg irons than the knee brace," because the brace had allegedly become painful. 27 R.T. 98. According to petitioner, the problem with the knee brace was "not that it's too tight, it's just the position of it, it's bearing up into my nerves in my leg and it's more or less cutting off the circulation or cutting off that nerve, period." Id. at pp. 99-100. Petitioner explained to the court that he had previously received

medical treatment for nerve problems in his legs. Id. at 99.

18. Upon receiving petitioner's complaint, Judge Orfield inquired as to the availability of any other type of leg brace. Id. at 100. According to the bailiff, "there was one other type but that is not available." Id. Petitioner again stated his willingness to proceed in leg chains rather than the brace. Id.

19. After Judge Orfield requested and reviewed California authority on the shackling issue, he concluded that "under the circumstances" petitioner "should be afforded an opportunity to start the trial without restraints . . . ." Id. at 127. After this ruling, the court proceeded with jury selection on October 6 and 7, 1980, with petitioner present and completely unrestrained.

20. On the morning of Wednesday, October 8, 1980, an incident occurred at the jail which renewed the court's concerns with respect to courtroom security. Upon learning of the incident, Judge Orfield immediately conducted a hearing outside the presence of the prospective jurors. 29 R.T. 374.

21. During the hearing on October 8, 1980, Deputy Christiansen testified that when he arrived at the jail at 7:45 a.m., petitioner had not been "brought down" for transport to court. Id. at 375. In his own testimony during this hearing, petitioner conceded that he had not responded with Deputy Scully twice tried to wake him so that he could prepare for court. Id. at 393-94. Instead, after Scully's second attempt, petitioner asked Scully to check his file to determine if the file contained a written agreement between the court and Captain Nichols as

to special wake-up arrangements for petitioner. Id. at 394.

22. Deputy Christiansen testified that he had heard from several other deputies that petitioner "feels he has this agreement" pursuant to which he is to be "brought down" only between 7:30 a.m. and 8:00 a.m., even though "most people are generally brought down at a quarter after 6:00 in the morning." Id. at 375.

23. On the morning of October 8, 1980, Deputy Christiansen checked petitioner's file and found no such agreement or other reference to special arrangements. Id. at 376.

24. After confirming that there was no such agreement, Deputy Christiansen, accompanied by Deputies Hansen and Wilderman, went to petitioner's cell, opened it, and ordered petitioner to get up for court. Id. at 376. Petitioner

did not respond, except to roll over. Id. at 377. In an effort to awaken petitioner, the deputies removed his blanket, "at which time he jumped to his feet, clenched both fists and moved to the back of the cell . . . ." Id. The deputies subdued petitioner, removed him from the cell, placed him against the external wall in a prone position, and shackled him. Id. As the deputies attempted to move defendant, "he continued to struggle, tried to break free . . . and spat in the face of Deputy Hansen." Id.

25. Throughout this incident, Deputy Christiansen testified that petitioner "continued a verbal onslaught the entire time, referring to the deputies as cowards for not removing the chains so he could fight one on one." Id.

26. At approximately 8:00 a.m., Sergeant Runyen arrived at the jail

control area, and observed the deputies "bringing Bernard Hamilton down in chains." Id. at 387. Sergeant Runyen testified that petitioner was wearing just his jail undershorts at this time. Id. Petitioner was placed in a holding tank and given his clothes to dress for court. Id. After petitioner had dressed, Sergeant Runyen opened the door to the holding tank and asked petitioner "what the problem was . . . ." Id. Petitioner complained that the deputies had mistreated him, and requested that he be allowed to return to his cell to "wash up for court." Id. at 388. Because petitioner had already been afforded "ample time" to get ready for court, but had voluntarily chosen to stay in bed, this request was refused. Id. Upon Runyen's refusal, petitioner undressed, and he was transported to court in a blanket and undershorts. Id. Petitioner

was not offensive towards Runyen during this conversation. Id.

27. During cross-examination by Ryan, neither Deputy Christiansen nor Sergeant Runyen deviated from the version of events described above. Id. at 381-386, 388.

28. Petitioner testified that Deputy Christiansen harbored personal animosity towards him, which had resulted in several previous confrontations. Id. at 390. Petitioner disputed Deputy's Christiansen's version of the incident in the cell, and claimed that he was roughly snatched out of bed, slammed against the wall, and handcuffed, causing him to suffer a split lip and a cut on his wrist. Id. at 395.

29. Based on petitioner's testimony before Judge Orfield and the testimony received at the evidentiary hearing, this court finds petitioner's

version of events incredible and unworthy of belief. According to Robinson, petitioner had previously indicated his intent to prevent the trial from going forward, even if it required an attack on the jail deputies. See IX E.H. 49-50. Robinson testified that petitioner had explicitly stated prior to his incident that "[h]e wasn't going to come down for a particular court hearing. If he had to fight with the guards, the guards would not be able to make him come down to appear in court for a particular hearing." Id.[6]

30. After hearing testimony on October 8, 1980, Judge Orfield again expressed his overriding

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6. This court makes no finding concerning whether petitioner may have staged the October 8 incident in order to delay the trial and/or create an appellate issue by getting himself reshackled. Whatever petitioner's motivation, this court finds only that the attack occurred at petitioner's instigation.

concern with the safety of the individuals working in the courtroom. Id. at 403.

31. Judge Orfield explicitly recognized "a pattern of increased agitation on the part of the defendant." Id. at 404. Further, Judge Orfield found that petitioner "has defied all authority and I think it is just a matter of time before he would begin to defy all authority here in the courtroom." Id.

32. In considering whether to reshackle petitioner after the attack on October 8, 1980, Judge Orfield also had "in mind" the prior attacks on Ryan and Robinson, III E.H. 14, as well as petitioner's threats to Robinson to disrupt the trial, id. at 15.

33. In addition, Judge Orfield considered petitioner's general demeanor in court, and found him to "be an angry individual." Id. at 16. Judge

Orfield was concerned that petitioner "was on the edge of losing control of himself at any time." Id.

34. As described above in Findings of Fact 17-18, the leg brace had already been rejected as a restraint option due to petitioner's claim of discomfort and the unavailability of any other type of brace. Judge Orfield also considered, and rejected, the possibility of counteracting petitioner's potential for violence by increasing the number of bailiffs around petitioner to three. Id. at 17. This alternative was rejected because Judge Orfield believed "that it would be just as bad for that to occur as to have him in shackles," and because Judge Orfield was concerned that additional bailiffs could not adequately control petitioner should he act out "in a very forceful and sudden manner." Id. at 17-18.

35. As a third alternative, Judge Orfield considering removing petitioner from the courtroom during trial, but this alternative was rejected as impossible due to petitioner's status as co-counsel. Id. at 19.

36. With no alternative available, and because of his extreme concern with the safety of court personnel, Judge Orfield ordered petitioner shackled for trial. 29 R.T. 404.

37. During the afternoon of Wednesday, October 8, 1980, jury selection resumed with petitioner in shackles. This was the first time petitioner appeared before any juror in shackles. As jury selection proceeded, Judge Orfield instructed each individual juror that he or she should draw no inference from the fact that the petitioner was shackled, and none of the

jurors expressed any prejudice towards petitioner as a result of the shackling. See e.g., 29 R.T. at 416, 432, 454. Petitioner participated in voir dire by questioning potential jurors directly. See e.g., 29 R.T. at 450.

38. After deciding that petitioner should be shackled, the court attempted to minimize the prejudicial effect of the shackling. The entire shackling mechanism worn by petitioner weighed approximately two pounds. X E.H. 107. Petitioner was always seated before the jury entered the courtroom, and the shackles were worn underneath his coat, as physically demonstrated during the evidentiary hearing. Id. at 101-02. However, because petitioner testified in his own defense, this Court finds that the jury was aware that petitioner was shackled.

39. The above findings of fact have been culled from the trial and evidentiary hearing transcripts. Upon review of said transcripts, and having made credibility determinations throughout the evidentiary hearing, this court concludes that said findings accurately describe the information available to Judge Orfield when he considered whether to shackle petitioner in front of the jury. In addition, and for the same reasons, this court concludes that the above findings accurately describe the factors and alternatives actually considered by Judge Orfield in deciding to shackle petitioner, as well as the prominence of the shackles from the jury's perspective.

B. Conclusions of Law

1. Although a criminal defendant generally has the right to appear before a jury free of shackles, the

trial court's decision to shackle a defendant is not per se unconstitutional. Spain v. Rushen, 883 F.2d 712, 715 (9th Cir. 1989), cert. denied, 110 S.Ct. 1937 (1990). It is within the trial court's discretion to use shackles or other security measures "when circumstances dictate," Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985), although this "must be limited to cases urgently demanding that action." Tyars v. Finner, 709 F.2d 1274, 1284 (9th Cir. 1983). The habeas court must review the trial judge's decision to use shackles for an abuse of discretion. Spain, 883 F.2d 716.

2. The trial court must take two steps prior to shackling a defendant. Jones v. Meyer, 899 F.2d 883, 884-85 (9th Cir. 1990), cert. denied, 111 S.Ct. 95 (1990). "First the court must be persuaded by compelling circumstances `that some measure was needed to maintain

the security of the courtroom.'" Id. at 885 (quoting Spain, 883 F.2d at 720). "Second, the court must `pursue less restrictive alternatives before imposing physical restraints.'" Jones, 899 F.2d at 885 (quoting Spain, 883 F.2d at 721).

3. To satisfy the second requirement, the trial court must first "assess the extent of the limitations that would be present if shackles were applied." Spain, 883 F.2d at 721. "These limitations include the following: (1) shackles may reverse the presumption of innocence by causing jury prejudice; (2) shackles may impair the defendant's mental faculties; (3) shackles may impede communication between the defendant and counsel; (4) shackles may detract from the decorum of the judicial proceeding; and (5) shackles may cause pain to the defendant." Jones, 899 F.2d at 885. "After considering these factors, the

trial judge 'must weigh the benefits and [these] burdens of shackling against other possible alternatives.'" Id. (quoting Spain, 883 F.2d at 721).

4. With respect to the first step prescribed in Spain, a number of factors, not just any single one, provided Judge Orfield with ample justification for implementing some type of security measure to protect courtroom personnel, defense counsel, and himself. Petitioner's attacks on Ryan and Robinson, combined with his outburst in jail on October 8, 1980, demonstrated petitioner's propensity towards violence and his inability to control himself.

5. Although these incidents occurred out of court, Judge Orfield also had every reason to believe that petitioner was likely to engage in violent activity in court, as evidenced by the following factors: (1) petitioner's

veiled threat during the in camera hearing on September 24, 1980; (2) Ryan's revelation on October 2, 1980, indicating to Judge Orfield that petitioner had stated to Robinson that he would disrupt the court proceedings by attacking counsel, the bailiff, or the judge himself; and (3) petitioner's general demeanor while before Judge Orfield. Because petitioner's propensity towards violence was well-documented, and because there was substantial evidence indicating that this propensity might be carried out in court, this court concludes that compelling circumstances existed which mandated the use of security measures.

6. In assessing the second step prescribed by Spain, the evidence indicates that Judge Orfield pursued alternatives prior to shackling defendant. In fact, Judge Orfield employed the leg brace alternative until petitioner's

complaints rendered the use of the brace impossible. Prior to shackling petitioner on October 8, 1980, Judge Orfield explored two other alternatives, but dismissed them as impracticable under the circumstances. With no other alternatives available, it is clear that the relative benefits and burdens of shackling petitioner mandated the decision eventually reached by Judge Orfield.

7. For these reasons, this court concludes that it was not an abuse of discretion for the trial court to order petitioner shackled under the circumstances.

III. INEFFECTIVE ASSISTANCE OF COUNSEL: SHACKLING REQUESTS

A. Findings of Fact

40. The court hereby incorporates by reference Findings of Fact 1-39 above. Although the above findings represent the information available to

Judge Orfield with respect to the shackling of defendant, they are also relevant to the circumstances surrounding Ryan's decision to request that petitioner be shackled on September 18 and 24, 1980. To the extent the above findings do not fully portray the circumstances surrounding Ryan's request with respect to Ryan's thought processes and the attorney-client relationship, they are supplemented below.

41. During the in camera hearings before Judge Gill on September 18, 1980, and Judge Orfield on September 24, 1980, neither Ryan nor Robinson gave a detailed account of the attack on Robinson. 21 R.T. 157, 162; 72 R.T. 3-4. However, the details of that attack were known to Ryan when he requested that petitioner be shackled, as Robinson had described the ferocity of the attack to him shortly after it occurred, at which

time she appeared terrified. V E.H. 107; VII E.H. 60. Robinson told Ryan that she had been forced to bite petitioner through the tongue. V E.H. 107. When Ryan asked petitioner about the incident, petitioner confirmed that he had attacked Robinson. V E.H. 109.

42. There is no credible evidence before the court indicating that this attack constituted anything less than a violent sexual assault. Robinson testified that when she attempted to leave the jail interview room after meeting with petitioner, petitioner blocked her path. VIII E.H. at 137. Petitioner grabbed Robinson, placed his hands around her neck, and began choking her. Id. at 137-40. Eventually, petitioner pinned Robinson's hands behind her back, and only when Robinson drew blood by biting petitioner's tongue did the attack cease. Id. at 140. Robinson characterized the

attack as "life-threatening." Id. at 149. The court finds Robinson's testimony to be credible and consistent with the type of attack that would have moved Ryan to approach Judge Gill with the shackling request.[7]

43. In addition to the physical assaults on Robinson and himself and the general threat of disruption, Ryan also considered, but did not reveal to the court, petitioner's ongoing threats "to get" particular witnesses, the bailiff, and the district attorney. V E.H. 126-29, 131, 135. Moreover, Ryan considered but did not reveal to the court,

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7. Petitioner's attempts to downplay this incident are totally unpersuasive and incredible. In light of Robinson's testimony, the characterization of this incident as an awkward romantic endeavor is repugnant and wholly unbelievable. See Petitioner's Post-Hearing Brief at 87 ("Her testimony that Petitioner's tongue was biten (sic) as he was advancing towards her with his tongue out of his mouth speaks eloquently of the amorous intent.").

petitioner's earlier episodes of violence, as related by his former wife, various girlfriends, and as suggested by a then pending robbery case in which petitioner had allegedly beaten an elderly woman. VI E.H. 144.

44. Against this backdrop of violent behavior and potential danger, Ryan requested that petitioner be shackled on September 18 and 24, 1980. When Ryan initially requested that petitioner be placed in restraints, he informed Judge Gill that his principal concern was the detriment that petitioner would suffer if he acted violently in front of the jury. 21 R.T. 159. In requesting that the shackles remain on petitioner during the in camera hearing before Judge Orfield on September 24, 1980, Ryan again reiterated his concern with the effect any violent outburst by petitioner might have on the jury. 72 R.T. 3, 4-5. Specifically, Ryan

"was concerned about Mr. Hamilton attacking somebody at the courtroom, acting out, attacking either in the presence of the jury or in the presence of somebody else who would testify to the attack at a penalty phase trial." V E.H. 133.

45. From the initial request through the evidentiary hearing, Ryan has never deviated from his position that shackles were necessary primarily to prevent petitioner from hurting his own cause before the jury. Based upon the trial record and a careful evaluation of Ryan's testimony during the evidentiary hearing, this court finds Ryan's position to be credible and truthful.

46. During the September 18, 1980 hearing, Ryan also alluded to his concern that petitioner's violent outbursts against Robinson and Ryan might later be used by petitioner to support a

collateral attack on Ryan's effectiveness, if Ryan did not reveal the incidents to the court. 21 R.T. 159-60; V E.H. 140.

47. During the hearings of September 18 and 24, 1980, Ryan never explicitly stated that his shackling request was motivated out of concern for his own safety or that his staff. However, his concern in his regard may be logically inferred from his comments, and this concern was certainly of substantial importance to Judge Orfield. 72 R.T. 8.

48. After the first request on September 18, 1980, Judge Gill asked Ryan whether he remained prepared to represent petitioner to the best of his ability. 21 R.T. 160. Noting that he had "given it a lot of thought," Ryan responded affirmatively, stating his belief that he could continue as lead counsel for the defense. Id. Ryan stated that he believed in petitioner's

innocence. Id. at 161. When the same question was put to Robinson by Judge Gill, she also responded affirmatively and stated that she too believed in petitioner's innocence. Id. at 162.

49. Ryan withdraw his shackling request on October 2, 1980, before petitioner ever appeared before the jury, and petitioner remained unshackled until October 8, 1980, when his jail outburst convinced Judge Orfield, over Ryan's objection, 29 R.T. 401, that petitioner should shackled during trial.

B. Conclusions of Law

8. In order to demonstrate unconstitutional ineffective assistance of counsel, a criminal defendant must satisfy two elements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment. Second, the

> defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 688, 687 (1984).

Importantly, the Court has held that "[j]udicial scrutiny of counsel's performance must be highly deferential," and the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." Id. at 689.

9. The sixth amendment guarantees every criminal defendant the right to the assistance of counsel who is unhindered by conflicting interests. Holloway v. Arkansas, 435 U.S. 475, 482 (1978). "Although the issue of a conflict typically arises in a case involving joint representation, it also may arise when a client's interest conflicts with that of

his attorney. The same principles apply." United States v. Ellison, 798 F.2d 1102, 1107 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987).

10. Where an alleged conflict of interest forms the basis of an ineffective assistance of counsel claim, the petitioner must demonstrate "that counsel `actively represented conflicting interests' and that `an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). If petitioner makes this showing, then prejudice is presumed. Strickland, 466 U.S. at 692.

11. In requesting that petitioner be shackled, Ryan was not actively representing conflicting interests. Ryan has stated, and this court has found, that Ryan's paramount concern was the potential for violent

conduct in front of the jury. Because such conduct would maximally prejudice petitioner before the jury, Ryan acted in petitioner's best interests in requesting that petitioner be shackled, particularly since the jury would be instructed to disregard the restraints. The fact that Ryan may have harbored lesser concerns, including the safety of his staff and the potential for collateral legal attacks by petitioner, does not change this result.

12. Moreover, Ryan's request did not adversely affect his performance. Ryan never wavered from his conviction that petitioner was innocent, and he explicitly informed Judge Gill that he was prepared to carry on as lead defense counsel. There has been no showing by petitioner that Ryan's performance suffered because of his initial desire to have petitioner shackled.

13. Alternatively, even if the initial shackling request did constitute a conflict of interest between Ryan and petitioner, this court concludes that Ryan was ethically required as an officer of the court to act as he did under these circumstances. See ABA Code of Prof. Responsibility, DR 4-101(C)(3) (permitting an attorney to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime"); ABA Model Rules Prof. Conduct, Rule 1.6(b)(1) (attorney may reveal confidential information "to prevent the client from committing a criminal act . . . likely to result in imminent death or substantial bodily harm"). By informing the court of the situation and requesting that petitioner be shackled, Ryan was merely refusing to be a silent partner in any future violent outbursts. Because Ryan indicated that he

was able to continue to represent petitioner after he had fulfilled his ethical duty, the court was entitled to allow Ryan to continue as counsel. To hold otherwise would merely encourage counsel to shirk his or her ethical duties in order to avoid any subsequent conflict of interest charges.

14. For these reasons, the court concludes that petitioner has not met the standard articulated in Strickland for ineffective assistance of counsel claims based upon an alleged conflict of interest.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL; INVESTIGATION AND TRIAL PERFORMANCE

A. Decapitation

(a) Findings of Fact

50. During petitioner's trial, Dr. Frances Luibel, the pathologist who performed the autopsy on the body of Eleanore Buchanan, testified that he was

unable to state with certainty whether the victim's head and hands were removed ante-mortem or post-mortem. 42 R.T. 2337. However, Dr. Luibel did state his opinion that the victim was "probably dead" when her hands were cut off. Id. Moreover, Dr. Luibel had expressed his opinion to Ryan in a pre-trial interview that decapitation occurred post-mortem, VI E.H. 157, and an investigative report prepared by Detective Cellucci also indicated that Dr. Luibel at least initially believed that decapitation occurred post-mortem, Petitioner's Exh. 23, p. 5.

51. During the evidentiary hearing, Dr. Luibel again testified that while he believed that decapitation occurred post-mortem, he was unable to render this conclusion "with 100 percent certainty." I E.H. 68. Petitioner's expert witness, Dr. Hormoz Guard, testified that in his opinion decapitation

occurred post-mortem. Id. at 47. Dr. Guard did not qualify his opinion or otherwise express any uncertainty as to its validity. Id. at 59.

52. Respondents concede that Ryan neither argued post-mortem decapitation to the jury, nor attempted to prevent the prosecutor from arguing that decapitation may have occurred while the victim was alive.

(b) Conclusions of Law

15. Petitioner has not met his burden under either prong of Strickland with respect to the decapitation issue. Because Dr. Luibel, who performed the autopsy, has never been able to testify to a certainty that decapitation occurred post-mortem, it would have been impossible for Ryan to prevent the prosecutor from arguing that decapitation might have occurred ante-mortem, even if Ryan obtained and

introduced expert testimony consistent with that offered by Dr. Guard. A prosecutor may argue any inference which is supported by the evidence. See e.g., People v. Beivelman, 70 Cal.2d 60, 76-77 (1968), cert. denied sub nom. Anderson v. California, 406 U.S. 971 (1972).

16. Moreover, Ryan's decision not to press the decapitation issue in the defense case cannot be characterized as professionally unreasonable. Whether the victim was decapitated before or after death, the jury was confronted by a particularly gruesome crime. For Ryan to introduce evidence and/or argument concerning when the victim was decapitated might strike a reasonable juror as an effort to trivialize the heinous nature of the crime. Instead of benefitting petitioner, such argument might have prejudiced the jury against him. Therefore, petitioner

has demonstrated neither deficient performance nor prejudice in Ryan's treatment of the decapitation issue.

B. Blood on the Shoe

(a) Findings of Fact

53. The prosecution introduced into evidence petitioner's blood-stained shoe. Trial Exh. 24. Analysis of the blood smear on the shoe revealed that it matched the victim's blood type, and was different than petitioner's blood type. 51 R.T. 3112, 3114. The shoe and its blood stain constituted one of the prosecution's many important pieces of evidence. X E.H. 88.

54. During trial, the defense attempted to introduce a theory suggesting that the shoe might have been smeared with the victim's blood through contact with the van's blood stained carpet, as opposed to contact with the victim herself. 59 R.T. 3906. The

defense expert criminalist, V. Parker Bell, testified that the blood could have been transferred to shoe from the carpet. Id. However, Bell conceded on cross-examination that there were no blue fibers from the carpet present in the blood on the shoe. Id. On rebuttal, the prosecution recalled criminalist Brandon Armstrong, who also testified that the blood on the shoe contained no blue fibers. 60 R.T. 4017. Moreover, Armstrong testified "that if the shoe had rubbed onto a stained bloody carpet that was -- had that loose of a nap, . . . the fibers would have stuck to the shoe in the blood or would have been mixed in with the blood deposited on the shoe." Id. at 4018.

55. During the evidentiary hearing, Bell testified that he was never asked by Ryan to test whether the shoe could have been stained by coming into

contact with blood from the carpet. V E.H. 34-35. Bell proceeded to describe a test he performed at the request of petitioner's present counsel, in which he applied blood soaked carpet samples to a shoe in an attempt to determine whether fibers would necessarily be transferred to the shoe. Id. at 35-37. Based upon his experiment, Bell concluded that "it would be possible that the blood could have been applied to the shoe by coming in contact with the bloody carpet, without a transfer of carpet fibers." Id. at 38.

56. Bell's experiment was flawed in numerous respects. First, the carpeting used was not from the victim's van, but was carpet that Bell determined to be similar by "look and feel." V E.H. 56. Bell conceded that the samples he used "were somewhat different from the carpet in the van." Id. at 36. Moreover, the shoes used by Bell were different than

petitioner's blood-stained shoe. 9 R.T. 127. Finally, the blood used in the Bell experiment came from the blood bank and had been treated with anticoagulants, so that its clotting capability, consistency, drying time, and tackiness were all different than that of the fresh blood which stained petitioner's shoe. 9 R.T. 126-27.

57. During the evidentiary hearing, Armstrong testified that he remained of the opinion that the stain on the shoe did not come from the rug. II E.H. 22-23. Armstrong observed that "[t]he body, the clothing, virtually everything that came out of the van had fibers on it if it had been in contact with the carpet . . . ." Id. at 23. Armstrong further testified that Bell's recent experiment did not change his opinion in any way. IX E.H. 131.

58. The court finds that the net effect of the evidence adduced at the evidentiary hearing is no different than that produced at trial, even taking into account Bell's new experiment. This court finds that Bell's test is of no persuasive value, and even its admissibility is extremely doubtful.

(b) Conclusions of Law

17. Petitioner has not met his burden under either prong of Strickland with respect to the blood on the shoe. The court concludes that competent counsel would not be required to conduct further tests with respect to the source of the blood, if he had already secured an expert opinion supporting the theory that the blood could have come from the carpet, as Ryan had done.

18. Moreover, even had Ryan investigated and argued the issue in the manner now urged by petitioner, there

has been no showing whatsoever that the jury would not have chosen to believe that the blood was transferred to the shoe through direct contact with the victim. Therefore, petitioner has demonstrated neither deficient performance nor prejudice in Ryan's investigation of the blood on the shoe.

C. Transportation of the Victim's Body

(a) Findings of Fact

59. During trial, the prosecution argued that the victim's body was transported to Pine Valley by petitioner in the victim's van, where it was dumped by petitioner. 63 R.T. 4150-51. Specifically, the prosecution posited that the victim's body was transported in the back of the van, in the storage compartment under the rear seat. Id. This contention was supported by the location of a major blood stain in the

storage compartment, and the presence of blue carpet fibers on the victim's stomach and arm stumps. Id.

60. In response to this argument, Ryan vigorously argued that the body was not transported to Pine Valley in the van, but rather transported in another car driven by the true killer. Id. at 4210-11. Noting that there was no dispute that the body was transported after rigor mortis had set in, Ryan suggested that the body could not have been transported in the position in which it was eventually discovered. Id. at 4210. Moreover, Ryan noted the absence of blood anywhere else in the van. Id. at 4211. Finally, Ryan emphasized the presence of other tire tracks in the remote area where the body was dumped, which he opined "were left by the vehicle that dropped that body there." Id. Ryan concluded "that the body was not taken out there in that van." Id.

61. During the evidentiary hearing, petitioner attempted to demonstrate that the body could not have been transported in the manner theorized by the prosecution. Petitioner's criminalist Bell testified that it was unlikely, although not impossible, that the body could have been transported in the storage compartment, given the location of the spare tire in that compartment at the time of petitioner's arrest. V E.H. 45. However, Bell conceded on cross-examination that the spare tire was not secured in the storage compartment, but could be moved freely. Id. at 60.

62. Respondents submitted evidence indicating that the body could have been transported by petitioner in the storage compartment. Specifically, respondents presented photographs of a female agent positioned in the storage

compartment. IX E.H. 138-45; Exh. A-25. However, the positioning of the agent for the photographs did not take into account the location of the blood stain, the location of the spare tire, and the position of the victim. IX E.H. at 147-49.

63. Based upon the foregoing evidence, the court finds that the victim could have been transported in the van in the manner argued by the prosecution. On the other hand, competent defense counsel could argue that the evidence does not support the prosecution's theory, as Ryan did. The court finds that the additional evidence proffered at the evidentiary hearing did not resolve the issue and would only marginally have affected the ability of either side to make their respective arguments.

(b) Conclusions of Law

19. Petitioner has not met his burden under either prong of Strickland with respect to the transportation of the victim's body. Ryan's argument in response to the prosecution's theory on this issue constituted effective assistance of counsel. Moreover, there has been no showing by petitioner that any additional investigation of this issue would have significantly advanced the credibility of Ryan's argument in this regard, given the state of the evidence.

20. In addition, petitioner has made no showing of prejudice, given the evidence amassed against him on this issue and many others. As demonstrated at the evidentiary hearing, even with additional investigation Ryan could not have stopped the prosecution from arguing persuasively

that the body was transported to Pine Valley in the van. Therefore, petitioner has demonstrated neither deficient performance nor prejudice in Ryan's treatment of this issue.

D. Petitioner's Identification of the Victim

(a) Findings of Fact

64. Upon petitioner's arrest in Oklahoma in possession of the victim's van, San Diego Sheriff's detectives Norman Crawford and Joe Cellucci travelled to Oklahoma to interview petitioner concerning the murder. 49 R.T. 2841. Petitioner explained to Detective Crawford that he came into possession of the van lawfully after travelling with the victim and a man named Calvin Spencer (aka "Spider"). Id. at 2862. According to petitioner's story at the time, the victim and Spider let him take the van and the victim's credit cards

in Shreveport, Louisiana, because they had business to conduct and petitioner did not want to stay in Shreveport. Id. at 2857-58, 2880-81. Petitioner claimed that the victim and Spider had agreed to contact him at his cousin's home in Oklahoma City, Oklahoma, the very next day. Id. at 2858, 2862. In other words, petitioner disclaimed knowledge of any homicide and told Detective Crawford that the victim was alive and well. Id. at 2869-70.

65. In order to lend credibility to this version of events, petitioner positively identified the victim, his purported travelling companion, from a photograph offered by Detective Crawford. Id. at 2873. In addition, petitioner consistently referred to the victim as "Fran," which was her true nickname. Id. at 2871-2873, 2873. Finally, petitioner stated that "Fran" was wearing light colored jeans and carrying a

beige purse when petitioner was supposedly travelling with her and Spider. Id. at 2875-76. In fact, when the victim left her home on the night she was murdered, she was wearing tan jeans and carrying a tan purse. 41 R.T. 2151.

66. The evidence indicates that petitioner abandoned the "Spider" story sometime after the victim's headless and handless body was positively identified as Eleanor "Fran" Buchanan. Petitioner claims that he concocted the "Spider" theory in order to avoid being charged with the simple theft of the van. 54 R.T. 3481. Since abandoning the Spider story, petitioner has steadfastly claimed, throughout trial and this proceeding, that he stole the abandoned van but has never seen the victim alive or dead.

67. Petitioner's revision of his story necessarily brought into question his ability to identify the

victim, refer to her by her nickname, and describe her purse and pants during the interview with Detective Crawford. During trial, Ryan argued that petitioner "knew [the victim] through the purse that was in the van and the information that was contained therein," 54 R.T. 3393, and the jury received evidence supporting that theory. See e.g., 41 R.T. 2116-17. However, Ryan never put into evidence any plausible explanation for petitioner's ability to describe accurately the style and color of the victim's pants.

68. During his closing argument at trial, the prosecutor attacked petitioner's contention that he had never seen the victim, observing that petitioner identified the victim to Detective Crawford, as well as the style and color of her pants. 63 R.T. 4151-53. Ryan did not attempt to rebut this specific argument in his closing.

69. During the evidentiary hearing, petitioner stated that he was able to identify the victim because there were photographs of her in the tan purse that he found in the van, as well as papers indicating that the owner of the van was named "Fran." II E.H. 46-47. Petitioner further stated that he "came up with the idea of light pants because her purse was light." Id. at 46. Petitioner explained that he cannot be held accountable for the "coincidence" that the victim was in fact wearing light pants on the day she was murdered. Id. at 148.

70. Based upon the trial and evidentiary hearing transcripts, as well as this court's evaluation of petitioner's testimony, the court finds that petitioner's theory with respect to his knowledge of the victim's pants is wholly incredible. Petitioner's claim that he guessed the style and color of

pants from the color of the purse is unworthy of belief, and would not have had any beneficial impact on the jury. The court infers that Ryan did not present petitioner's theory to the jury because it was unbelievable and would have caused petitioner further prejudice by emphasizing the strength of the government's case in this regard.

(b) Conclusions of Law

21. Petitioner has not met his burden under either prong of Strickland with respect to his identification of the victim. The court concludes that Ryan acted competently when confronted by an extremely difficult situation. Although Ryan may not have fully responded to the prosecutor's closing argument on this issue, the evidence supporting the defense theory of identification was submitted to the jury. With respect to the discrete issue of the

pants, Ryan's failure to present a completely incredible story to the jury was a reasoned tactical decision and does not constitute deficient performance.

22. Moreover, even had Ryan adopted the strategy now urged by petitioner, there has been absolutely no showing of prejudice. On this issue the prosecution's case was extremely strong, and the evidence adduced at the evidentiary hearing would not have weakened the government's case in any respect. In other words, even after eleven years and with the benefit of hindsight, petitioner's present counsel have fared no better in mitigating the impact of petitioner's statements to Detective Crawford. Quite simply, it is doubtful even a miracle worker could have done so, and Stickland does not require defense counsel to be miracle workers. Therefore, petitioner has demonstrated

neither deficient performance nor prejudice in Ryan's argument concerning the identification of the victim.

E. Cumulative Impact of the Alleged Deficiencies

(a) Findings of Fact

71. Judge Orfield stated that the evidence of guilt in this case was "overwhelming," even though it was based upon circumstantial evidence. III E.H. 23. In addition, Judge Orfield opined that "Mr. Ryan did an excellent job in a most difficult case with a very, very difficult client." Id. at 21; see also 66 R.T. 4320 (statement to same effect by Judge Orfield at conclusion of guilt phase of trial, noting that "[i]t is almost as if Mr. Hamilton were attempting to sabotage his case.").

72. Moreover, the prosecutor in the case, Thomas McCardle, testified during the evidentiary hearing

that Ryan did "an amazing job in a case which seemed to me to be impossible for any defense attorney to win." IX E.H. 158. McCardle noted that Ryan was "hobbled greatly by the defendant's inability to keep his mouth shut, and the defendant's inability to refrain from taking positions in writing under oath and sometimes not under oath that put Mr. Ryan in an extremely difficult position." Id. at 159.

73. Based upon its own independent review of all of the evidence, and notwithstanding the contrary opinion of petitioner's expert witness, this court agrees with the conclusions reached by Judge Orfield and McCardle. The evidence amassed against petitioner was overwhelming. Reasonably interpreted, the evidence could only have supported a guilty verdict. Moveover, petitioner's own statements and letters contributed

substantially to his guilt, and persistently frustrated the efforts of Ryan to present the defense case.

(b) Conclusions of Law

23. This court has explicitly concluded that petitioner has not demonstrated ineffective assistance of counsel with respect to any of the individual attacks on Ryan's performance. Therefore, it is obvious that the cumulative impact on these non-deficiencies cannot constitute ineffective assistance under Stickland.

24. However, even if one or more of petitioner's challenges to Ryan's performance were viable, petitioner has still not demonstrated prejudice on a cumulative level. In other words, the strength of the prosecution's case is such that petitioner's tactical challenges, guided by hindsight, do not undermine this

court's confidence in the outcome of the trial.

25. Moreover, Ryan's decision not to argue lingering doubt at the penalty phase does not indicate incompetence, where the evidence arrayed against petitioner was so overwhelming that counsel could reasonably have concluded that the jury could not be persuaded to recognize any lingering doubt. Under these circumstances, reasonable counsel might choose tactically to emphasize other avenues in his or her mitigation strategy, as Ryan did here.

26. The law rightfully does not recognize the concept of ineffective assistance by the criminal defendant himself. Instead, the law is generally willing to allow a criminal defendant to aid the prosecution's case, whether such aid be rendered purposefully or inadvertently. Here, petitioner

rendered such aid consistently and to the prosecution's ultimate reward. Viewed in this light, petitioner's current attempts to challenge counsel's performance ring hollow, and reflect petitioner's persistent belief that he can blame others for those troubles which he brings upon himself. This court is not impressed by these attempts, and concludes with unequivocal certainty that petitioner received assistance of counsel that went far beyond the level guaranteed by the Constitution.

V. DENIAL OF PETITIONER'S ALLEGED REQUESTS FOR SELF-REPRESENTATION

A. Findings of Fact

74. After waiving extradition from Oklahoma, petitioner was arraigned in San Diego and Patrick O'Connor was appointed to represent him. At the time of the arraignment, O'Connor was already representing petitioner on a

pending robbery charge. On Wednesday, June 27, 1979, during the preliminary hearing before Judge Stahl, petitioner requested that O'Connor be relieved, stating, "I feel I'm being wrongly advised and there are several other personal things involved . . . . [H]e is doing an inadequate job as far as defending me at the best than he has (sic)." 2 P.H.T. 216-17. Judge Stahl denied petitioner's motion, observing that O'Connor "knows best how to conduct this matter, Mr. Hamilton, and from all I have seen, he is the best qualified by far of any attorney to represent you at this hearing." Id. at 217.

75. On Friday, September 14, 1979, during pre-trial motions before Judge Maas, petitioner requested again that O'Connor be removed from the case. 5 R.T. 1. The prosecutor, noting that "[w]e have heard this business from Mr. Hamilton

before," objected to hearing the motion without any prior notice and without an opportunity to brief the issue. Id. at 2-3. In considering whether to hear petitioner's request, the court recognized the potential for delay and, more importantly, the ability of a defendant to create delay through such motions: "Because as an obstructionist tactic, a defendant can raise this all the time, with no notice, and witnesses come here and expect to present their evidence, and go on." Id. at 3. Nevertheless, over the prosecutor's objection, Judge Maas continued the pre-trial motions so that the motion to relieve counsel could be heard by the presiding judge, Judge Gilliam. Id. at 4. In so ruling, Judge Maas stated, "I consider this an obstructionist tactic by Mr. Hamilton, but he has a right to have this issue raised,

and litigated, and disposed of." Id. at 5.

76. On Wednesday, September 19, 1979, before Judge Gilliam, petitioner's request was heard and considered. In requesting specific grounds for petitioner's motion, the court noted that O'Connor is "one of the better lawyers," and "has done everything timely, and he's interested in the case . . . ." VII R.T. 10. In objecting to the motion, the prosecutor stated, "it is clear that one of the effects of the defendant's motion will be to get another continuance of the trial date." Id. at 19.

77. During the hearing on September 19, petitioner claimed that he had lost trust in O'Connor as a result of O'Connor's failure to do everything demanded by petitioner during the preliminary hearing and the continuing defense investigation. Id. at 23-28.

Moreover, petitioner bemoaned O'Connor's inability or unwillingness to cure problems being experienced by petitioner due to his incarceration. Id. 28-30. After hearing the above complaints about O'Connor, Judge Gilliam indicated that he was inclined to deny the motion, as he was "confident that [O'Connor] will be as fair and as straight a shooter as you can get." Id. at 31.

78. However, after stating his complaints regarding O'Connor's performance, petitioner claimed that he was told by an employee of the Public Defender who "works under Mr. O'Connor" that petitioner may be advised to enter a plea of insanity. Id. at 32. Petitioner claimed that the employee was an investigator whom he had known since childhood, who also told him that he had better "watch" O'Connor. Id. at 32-33. Upon the court's request, petitioner

identified the employee as Doug Hendrix. Id.

79. Apparently accepting petitioner's story as true, and without further inquiry at this time, Judge Gilliam stated that a "breach of faith" had occurred. Id. at 34.[8] Accordingly, O'Connor was relieved and the court ruled that his replacement would have to come from outside of the public Defender's Office. VII R.T. 34. Judge Gilliam explicitly stated that O'Connor was not being relieved because of anything he had done or failed to do in the case, notwithstanding petitioner's performance related complaints. Id. at 37.

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8. When Judge Gilliam conducted a subsequent hearing to investigate the matter, considerable doubt was cast upon petitioner's allegations. Hendrix testified, "It's my opinion that Bernie fabricated everything he said in this courtroom today just so he can get a new lawyer. I tried my best to help him." 9 R.T. 47.

80. On Friday, September 21, 1979, Jerome Wallingford appeared before Judge Gilliam and stated that he had been contacted by the Public Defender in connection with taking over the defense of petitioner. 8 R.T. 42. Wallingford and petitioner had met "for a couple of hours" the day before, and petitioner stated to the court his willingness to have Wallingford represent him. Id. The court stated, "You have a good lawyer." Id. Wallingford was formally appointed later that day, again with petitioner's approval. 9 R.T. 43.

81. On Wednesday, November 7 and Friday, November 9, 1979, petitioner moved to have Wallingford removed and another attorney appointed. 11 R.T. 55, 59. After hearing extensively from petitioner in camera, Judge Gilliam stated, "I've been through all the reasons with you, and I can't see that you have

any reasonable grounds to remove Mr. Wallingford." 76 R.T. 29. At the conclusion of the hearing on November 9, 1980, Judge Gilliam nevertheless agreed to have another attorney appointed to assist Wallingford. Id. at 29. Petitioner apparently renewed his motion to have Wallingford relieved on Tuesday, November 20, and Wallingford did not object, stating, "I just don't think I can work with Mr. Hamilton, and I think he agrees at this point. . . . I feel like I have tried everything I can to try to work with him and at this point I just don't believe it would be fair to Mr. Hamilton to leave me on the case." Id. at 63.

92. On Monday, November 26, 1979, Ryan was formally appointed to represent petitioner, and Wallingford was relieved. 12 R.T. 4. Upon appointing Ryan, Judge Gilliam stated:

> Mr. Hamilton, I don't know that I'm going to talk to you any

> more about change of lawyers because we've been through two very, very competent lawyers and now three. Now you are working with Mr. Ryan, and he is also a competent lawyer. And the filibuster has got to stop. We're going to trial on this case.

Id. at 13. This court finds that Judge Gilliam's statement reflects the general belief of the trial court that petitioner was attempting to inject delay and uncertainty into the proceedings by constantly requesting that counsel be removed. This court finds said belief to be entirely correct inasmuch as petitioner's irrational and perpetual dissatisfaction with counsel can only be explained by his desire to manipulate the system.

83. Based upon the proceedings through November 26, 1979, when Ryan was appointed, this court finds that petitioner engaged in a pattern of activity that was not motivated by good

faith disputes over defense strategy, but rather was designed solely to manufacture potential error and cause delay. Most importantly, it is this context in which petitioner's subsequent motions to represent himself must be viewed.

84. On Monday, April 21, 1980, before Judge Gill, petitioner moved to have Ryan removed from the case. 17 R.T. 5. Petitioner charged Ryan and co-counsel Camberg with failing to raise certain issues which he deemed important, and stated that he could no longer trust them. Id at 6-13. Ryan responded that he believed that he could continue to represent petitioner to the best of his ability. Id. at 20. Louis Katz, Director of Defender Services for the county, reviewed in detail petitioner's history of dissatisfaction with his appointed attorneys, and concluded, "I know Mr. Ryan has done a very complete and competent job

in this area. I think, your Honor, it's just Mr. Hamilton is never going to be satisfied with whoever he gets." Id. at 22.

85. The prosecution opposed petitioner's request to have Ryan and Camberg removed, noting that the current trial date was already thirteen months removed from the date of the murder. Id. at 26. Notwithstanding the prosecution's desire to have the matter come to trial, petitioner stated, "And as far as time is concerned, I'm not worried about the time it takes." Id. at 28.

86. After hearing from all parties, Judge Gill found that Ryan and Camberg "have been working very diligently in Mr. Hamilton's behalf," and that Ryan "is well qualified by experience, competent training, background, to handle a case of this magnitude." Id. at 30.

Accordingly, Judge Gill denied the motion to relieve counsel. Id.

87. Upon Judge Gill's denial of the motion, petitioner stated, "I request to represent myself then. I might as well." Id. Judge Gill responded that the motion was not presently before the court, but could be raised at a later time. Id. at 30-31. The court then recessed for the day. Id. at 31. This is the first "request" relied upon by petitioner before this court, and is hereinafter referred to a "Request 1."

88. On Friday, April 25, 1980, before Judge Gill, petitioner renewed his motion to have Ryan relieved, and Ryan himself moved to be relieved, observing that since the hearing on April 21 petitioner had completely refused to speak to him. 18 R.T. 33. The court denied Ryan's motion for the same grounds upon which petitioner's motion was denied

on April 21. Id. at 34. After hearing extensively from petitioner, the court continued the hearing on petitioner's motion until April 28, 1980. Id. at 71.

89. On Monday, April 28, 1980, petitioner was again permitted by Judge Gill to discuss extensively his reasons for wanting Ryan and Camberg removed. Id. at 74-96. Primarily, petitioner bemoaned the fact that Ryan would not investigate petitioner's belief that Harry Piper, who discovered the victim's body, was the true killer. Id. at 74-75, 84. Petitioner attributed the failure of Ryan and Camberg to pursue the Piper theory to racial prejudice on their part. Id. at 96.

90. After explaining his reasons for wanting Ryan and Camberg removed, petitioner stated, "And if they're not going to defend me, I'd be better off making a fool of myself on my

own in front of -- ", at which point petitioner was interrupted by the court. Id. Petitioner did not pursue this expression of opinion further. This is the second "request" relied upon by petitioner before this court, and is hereinafter referred to as "Request 2."

91. After hearing from Ryan, and then hearing further from petitioner, Judge Gill denied petitioner's motion to relieve Ryan and Camberg. Id. at 111. The court stated that petitioner had presented no substantial basis supporting the motion to relieve Ryan and Camberg. Id. Petitioner immediately proceeded to ask Judge Gill about his pending request for telephone call privileges, and did not in any manner reiterate or otherwise allude to a desire to represent himself. Id. at 112.

92. On Friday, May 9, 1980, petitioner filed a handwritten

motion to relieve counsel and to represent himself. Id. at 114. However, before that motion could be heard, petitioner withdrew it and indicated that he instead wished to be designated co-counsel with Ryan and Camberg. Id. at 114. On Tuesday, May 13, 1980, Judge Gill granted petitioner's motion to be designated as co-counsel on the case with Ryan and Camberg. Id. at 135. The record suggests that this motion was granted in order to appease petitioner with respect to his role in the defense. Id. at 123-24.

93. On Tuesday, May 20, 1980, during pre-trial motions pursuant to Penal Code §§ 995 and 1538.5, Ryan advised Judge Maas that petitioner wished to renew his motion to represent himself. 19 R.T. 428. Ryan stated that "[petitioner] has told me that if, unless we proceed his way, he wants to be his own -- he wants me relived, he wants to represent himself."

Id. at 434. Petitioner stated his request in the alternative: "My request is to have Miss Camberg and Mr. Ryan relieved as counsel. In the event that is not granted, I would seek to renew my motion to proceed in pro per." Id. at 435. This is the third request relied upon by petitioner before this court, and is hereinafter referred to as "Request 3."

94. The prosecution again raised the prospect of delay, noting that every time the parties attempted to resolve pre-trial matters, "Mr. Hamilton has raised these issues with respect to representation . . . ." Id. at 439. The prosecutor stated, "But we can't stop the court processes every time Mr. Hamilton raises this issue of representation, because we will never get this damn thing done." Id. at 440.

95. After hearing from all parties on May 20, 1980, Judge Maas denied the alternative motion, finding:

> Mr. Hamilton has not stated a valid reason why Mr. Ryan should not represent him, and specifically the Court finds that for all intents and purposes Mr. Hamilton does not have a legitimate objection, but is only grasping at anything he can think of to delay the proceedings and I so find as to the 995 motion, and I will not relieve Mr. Ryan nor will I allow you to represent yourself in the matter. I find that you are not competent to represent yourself in the 995 because I do not believe that you understand the legal principles involved, the issues involved, or are able to fairly and adequately represent yourself.

Id. at 450 (emphasis supplied).

96. On June 11, 1980, Ryan moved to continue the trial, which was then set for June 23, 1980, so that the parties could await the result of a case then pending before the California Supreme Court, People v. Hovey, as that decision was considered relevant to the

proceedings. 20 R.T. 1. The court granted the motion, and set a new trial date of August 12, 1980. Id. at 5. On July 30, 1980, the parties stipulated to a continuance of the trial from August 12, 1980 to September 10, 1980. 21 R.T. 138. The California Supreme Court issued its decision on August 28, 1980. Hovey v. Superior Court, 28 Cal.3d 1 (1980), cert. denied, 488 U.S. 871 (1988).[9/]

97. Subsequent to the court's denial on May 20, 1980, and prior

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9. The California Supreme Court's decision in Hovey required "that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." Hovey, 28 Cal.3d at 80. In so ruling, the court expressed its concern that the court's dismissal of those venirepersons who express unequivocal opposition to the death penalty "is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes." Id. at 74. Insofar as Hovey sought to eliminate this process, the decision benefitted petitioner.

to empanelment of the jury, petitioner submitted additional motions seeking to represent himself that he later withdrew, see 21 R.T. 150; 22 R.T. 4; 29 R.T. 410; 34 R.T. 1090, and one motion to represent himself that was heard in camera on the first morning of trial, after the jury had been empaneled, which was denied, 40 R.T. 2008-14. In addition, during trial petitioner filed a petition for writ of habeas corpus attacking the denial of his request to represent himself, and requested a continuance. 47 R.T. 2694. This petition was denied for a number of reasons, including the court's concern with further delay and petitioner's inability to mount a defense on his own. Id. at 2712-14. These motions further reflect the persistence with which petitioner sought to delay the trial.

98. During the evidentiary hearing, Judge Orfield testified that

petitioner never made an unequivocal request for self-representation. III E.H. 9. In reaching this conclusion, Judge Orfield cited the "ambivalence" on petitioner's part in making the requests. III E.H. 9-10.

99. Petitioner's own expert witness, Howard Gillingham, after reviewing letters written by petitioner to Robinson and Ryan, testified before this court that petitioner "goes back and forth, quite frankly, on the pro per action and seems to use that as part of his frustration -- venting his frustration to get control of his case in some way, of his own destiny." IV E.H. 26.

100. Ryan testified before this court that he does not believe that petitioner "was ever sincere in wanting to represent himself." VI E.H. 38. In support of this conclusion, Ryan stated, "I believe he knew how to do it but was

trying to make a record that would appear that he was trying to go pro per but he would not go that last step that was needed to do so." Id. at 38. In fact, Ryan advised petitioner how to move to proceed in propria persona, and provided him with the relevant legal authority, although petitioner never relied on it. Id. at 36-37.

101. Robinson testified before this court that each time petitioner filed a motion to relieve counsel, Ryan "would come down to the jail and he would say, `Bernard, do you really want me off this case? If you really want me off this case, I will leave.' And Bernard would say `No.'" VIII E.H. 134. In addition, petitioner reiterated to Robinson privately his desire to have Ryan stay on the case, despite the pendency of the motions to relieve. Id. Robinson noted that petitioner "was bent on

stopping the trial." Id. at 149. According to Robinson, "he was just very afraid of proceeding to trial and that was his way of acting out. He definitely had informed me that he did not want to have Mr. Ryan relieved." IX E.H. 142.

102. Based on the testimony received at the evidentiary hearing and the state court transcripts, this court finds the testimony offered by Judge Orfield, Ryan, and Robinson credible and entirely consistent with the events documented in the state court transcripts. Specifically, petitioner's persistent attempts to relieve capable counsel suggest a desire to delay the trial, and this inference is supported and confirmed by the above referenced testimony.

B. Conclusions of Law

27. A criminal defendant in a state court trial has an absolute right to be represented by counsel or to

represent himself. Faretta v. California, 422 U.S. 806, 807 (1975). The assertion of the right to self-representation must be knowing and intelligent, id. at 835, timely and not for the purpose of delay, United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam), and unequivocal, Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986).

28. Before a defendant's decision to waive counsel will be knowing and intelligent, he "must be aware of the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation . . . ." United States v. Balough, 820 F.2d 1485, 1487 (9th Cir. 1987).

29. A Faretta request is timely if it is asserted "before the jury is empaneled, unless it is made for the

purpose of delay." Smith, 780 F.2d at 811 (citations omitted).

30. The requirement that the request be unequivocal serves two purposes. Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). "First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self representation." Id.; see also Brewer v. Williams, 430 U.S. 387, 404 (1977) (courts must indulge in every reasonable presumption against waiver of the right to counsel).

31. Second, the requirement that the request be unequivocal serves an institutional purpose by preventing the manipulative defendant from creating error as a result "of the mutual exclusivity of the rights to counsel and self-representation."

Adams, 875 F.2d at 1444. In other words, where a defendant vacillates, the trial court might be placed in a difficult position: "If the court appoints counsel, the defendant could, on appeal, rely on his intermittent requests for self-representation in arguing that he had been denied the right to represent himself; if the court permits self-representation, the defendant could claim he had been denied the right to counsel." Id. As the court stated in Carroll, "the requirement of unequivocality resolves this dilemma by forcing the defendant to make an explicit choice. If he equivocates, he is presumed to have requested the assistance of counsel." Id.

32. However, a Faretta request is not considered equivocal merely because it is conditional on the court's denial of a motion to substitute counsel,

provided that there is no evidence of vacillation. Id. at 1445.

33. Petitioner would have this court view his purported Faretta requests in a vacuum, without reference to his continuous motions to relieve competent counsel and the corresponding inference that petitioner was only interested in delaying the trial. In other words, petitioner argues only from the specific statements made on April 21 (Request 1), April 28 (Request 2), and May 20 (Request 3), and concludes that those statements, standing alone, constitute unequivocal requests to represent himself. However, it is clear that any inquiry into delay and equivocality requires that the requests be viewed in the larger context of petitioner's ongoing attempts to relieve counsel and the motivations which may reasonably be ascribed to those

attempts, based on the totality of the circumstances and the supporting evidence.

34. The court is satisfied that petitioner's purported requests were knowing and intelligent insofar as he recognized the nature of the charges against him, the potential penalties, and the dangers inherent in representing himself.

35. The court is likewise satisfied that each purported request was timely insofar as it was asserted prior to empanelment of the jury.

36. However, the court concludes that each request made by petitioner was made for the purpose of delay. Based upon petitioner's perpetual dissatisfaction with counsel, the lack of any reasonable explanation for that dissatisfaction, and the evidence received by the court through the state court transcripts and the evidentiary hearing,

the court concludes that petitioner's request to proceed pro se were made for the sole purpose of delaying the trial date.

37. It is important to note that the court does not reach this conclusion as a result only of petitioner's perpetual dissatisfaction. This fact, standing alone, might not support the conclusion being drawn here. Instead, the court renders its decision because of the circumstances surrounding petitioner's repeated requests for new counsel and/or to represent himself, as well as the evidence received at the evidentiary hearing. When the issue is placed in the proper context and all of the available evidence is considered, the court is left with the inescapable conclusion that petitioner was using every tactic available to him to create delay.

38. Petitioner argues that his requests could not have been made for the purpose of delay because the parties had stipulated to a continuance of the trial date in order to await the Hovey decision. See Petitioner's Brief, p. 90. This contention is wholly without merit. The motion to continue the trial in order to await the Hovey decision was not made until June 11, 1980, and the stipulation continuing the trial date for that reason was not accepted by the court until July 30, 1980. See supra Finding of Fact 96. However, the purported Faretta requests were made on April 21, April 28, and May 20, 1980, when the trial date was set for June 23, 1980. Therefore, the subsequent continuance has no bearing whatsoever on whether petitioner was seeking to delay the trial by virtue of his requests.

39. Because the court concludes that each of the three disputed

Faretta motions were made for the purpose of delay, the motions were properly denied.

40. Alternatively, the court concludes that each request was made equivocally. Request 1 and Request 2 were both statements in which petitioner did not manifest a true desire to represent himself, but merely frustration with the process and the denial of his request to substitute counsel. See supra Finding of Fact 87 ("I might as well."); Finding of Fact 90 ("I'd be better off making a fool of myself on my own . . . ."). Because Request 1 and Request 2 were accompanied by these self-defeatist pronouncements, they cannot be considered unequivocal. Rather, each request was plainly "a momentary caprice or the result of thinking out loud." Carroll, 875 F.2d at 1445. Because the court must indulge in every reasonable presumption against

waiver of the right to counsel, Request 1 and Request 2 must be considered equivocal.

41. With respect to Request 3, the court recognizes that it was stated more firmly. See supra Finding of Fact 93. However, upon consideration of the surrounding circumstances and the evidence adduced at the evidentiary hearing, this court concludes that Request 3 also was not made unequivocally. In order to reach this conclusion, the court has looked beyond the mere words spoken, as those words provide only the most superficial aid in determining whether petitioner's request was unequivocal. In this case, the inquiry into unequivocality must encompass more than mere semantics.

42. Most importantly, there is overwhelming evidence indicating that petitioner's prime motivation was to delay the trial, and that he did not

really want to relieve Ryan. See supra Findings of Fact 98-102. When this evidence is applied to petitioner's conduct throughout the state proceedings, an unmistakable pattern of manipulation and dishonesty emerges. Against this backdrop, any request made by petitioner must be carefully evaluated in order to discern his true motivations. In this instance, the court concludes that the only thing unequivocal about Request 3 was petitioner's unequivocal desire to delay the trial, as recognized by Judge Maas at the time. The request itself, while unequivocal to the naked ear, cannot be considered unequivocal when considered in the context of petitioner's ongoing attempts to frustrate the administration of justice.

43. Because the court alternatively concludes that each of the three disputed Faretta motions were made

equivocally, said motions were properly denied.

VI. ALLEGED IMPROPER ADMISSION OF EVIDENCE

A. Findings of Fact

103. The trial court admitted into evidence three letters written by petitioner while he was in prison for burglary in 1973, each of which evidenced petitioner's extraordinary fear of prison and willingness to do anything to secure his release. See 52 R.T. 3228-29 (petitioner claims he was an informant; "I'm afraid to come out of my cell and I'm afraid to hear from home"); 52 R.T. 3230 ("I had been threatened quite a few times and I'm under great fear"); 52 R.T. 3232-3236 (petitioner offers to turn in his own brother and many others in exchange for leniency). Judge Orfield rules that the letters were relevant to motive, pursuant to the government's theory that petitioner

would do anything to avoid returning to prison, including killing a witness. 24 R.T. 324. Those portions of the letters which the judge found inappropriate were excised. See 52 R.T. 3208.

104. The trial court allowed Deputy Sheriff Parsons to testify to a conversation between Parsons and petitioner, which Parsons claimed occurred when he was securing petitioner's chains in prison. Parsons testified that petitioner stated, "All right, you have your fun, I'll have mine later." Parsons responded, "I thought you already had your fun," to which petitioner replied, "Yeah, and I'll kill a lot more, too, and you may be first on my list." 53 R.T. 3329. Judge Orfield ruled the testimony admissible as a spontaneous statement that was not the result of custodial interrogation. Id. at 3325.

105. By stipulation of counsel, the jury was informed that petitioner had purchased a saw, butcher knife, and two shanks of twine, while travelling in the victim's van, and after threatening to kill former girlfriend Donna Hatch. The trial court had ruled the evidence admissible, finding that the evidence indicated that petitioner might have intended to kill Hatch in the same manner as the victim in this case was killed, and for the same reason. 25 R.T. 387. Therefore, the court concluded that the purchases "might well show a consciousness on the part of the defendant of his guilt." Id.

106. The trial court admitted into evidence a letter written by petitioner to a friend, Theresa Roch, in which petitioner relates threats from a person named Quack to kill O'Connor, the prosecutors, the prosecution's

criminalist, "and at least one member of their family," if petitioner is convicted. 47 R.T. 2741. Petitioner notes in the letter that Quack seeks his approval for these murders, but he has not decided yet whether to give such approval. Id. Because petitioner knew that his outgoing mail was being read by the authorities, Judge Orfield ruled the letter admissible as an attempt to intimidate the prosecutors and the criminalist, who was a key witness. Id at 2738.

B. Conclusions of Law

44. In the federal habeas corpus context, a petitioner's attack on the correctness of state evidentiary rulings does not allege a cognizable deprivation of federal rights. Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). However, when a petitioner claims that the improper admission of evidence deprived him of due process under the

fourteenth amendment, he alleges a cognizable claim under § 2254. Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986), cert. denied, 479 U.S. 1068 (1987). In order to prove a due process violation, petitioner must demonstrate that "the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van De Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Under this standard "the presence or absence of state law violation is largely beside the point." Id. at 919-20. However, "adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner . . . ." Id. at 919.

45. In this case, petitioner has fallen far short of the heavy burden he bears under the relevant authority. First of all, this court

concludes that the admission of the disputed evidence by Judge Orfield was not an abuse of discretion under the evidentiary laws of California. Each piece of evidence disputed by petitioner was relevant, and in each case the probative value was not outweighed by the danger of undue prejudice. See Cal. Evid. Code § 352.[10/] Therefore, pursuant to Jammal there is at lest the suggestion of procedural fairness.

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10. The court recognizes that the California Supreme Court, on direct appeal, held that the admission of the three letters from 1973 was non-prejudicial error, but that the other items were admitted properly. See Hamilton I, 41 Cal.3d at 424-30. While the California Supreme Court held that the theory of motive with respect to the 1973 letters "simply does not wash," Hamilton I, 41 Cal.3d at 426, this court disagrees. Petitioner's aversion to incarceration went well beyond that experienced by most defendants and former convicts, and he threatened to kill Donna Hatch when it appeared her perceived intransigence might also damage his ability to stay out of jail. Under these circumstances, it is hardly speculative to theorize as to the desire of a burglar to kill an eyewitness.

46. Even if one or more of the pieces of evidence were admitted improperly, petitioner has not demonstrated fundamental unfairness. While the evidence may have damaged petitioner's defense, it is not the type of evidence that "necessarily prevents a fair trial." Kealohapauole, 800 F.2d at 1465; see also Jammal, 920 F.2d at 921. As this court has already found, the evidence arrayed against petitioner was overwhelming, see Finding of Fact 73, and the evidentiary items disputed here were peripheral to the primary thrust of the prosecution's case. Therefore, even if one or more of the items was admitted improperly, this court concludes that petitioner's trial was not offensive to the fourteenth amendment.

VII. ALLEGED VIOLATION OF PETITIONER'S RIGHT BY THE CALIFORNIA SUPREME COURT

A. Findings of Fact

107. On direct appeal, the California Supreme Court initially affirmed petitioner's conviction, but reversed the findings of special circumstances and the judgment of death. Hamilton I, supra note 1. The court held that the trial judge's failure to instruct that intent to kill was an element of the felony-murder special circumstances, in accordance with Carlos v. Superior Court, 35 Cal.3d 131 (1983), and mandated reversal of the death penalty judgment. Hamilton I, 41 Cal.3d at 431-32.

108. The Supreme Court granted the Attorney General's petition for a writ of certiorari, ordered the judgment of the California Supreme Court vacated, and remanded the case for reconsideration in light of its decision

in Rose v. Clark, 478 U.S. 570 (1986). California v. Hamilton, 478 U.S. 1017 (1986). In Rose, the Court held that the doctrine of harmless error may apply to jury instructions which erroneously shift the burden of proof to the defendant, provided that the record developed at trial establishes guilt beyond a reasonable doubt. Rose, 478 U.S. at 579-82.

109. Prior to remand by the United States Supreme Court, the California Supreme Court decided People v. Anderson, 43 Cal.3d 1104 (1987), in which the court overruled Carlos and held that intent to kill is not an element of the felony-murder special circumstance, except when the defendant is an aider and abettor rather that the actual killer.

110. Upon revisiting the instant matter on remand, the California Supreme Court stated that the entire cause

was before the court "because the United States Supreme Court vacated the judgment in Hamilton I and rendered the decision a nullity." Hamilton II, 45 Cal.3d at 363. Moreover, the court reasoned that "the doctrine of law of the case does not bar reconsideration of any point decided in Hamilton I. The doctrine may be applied only when and to the extent the prior decision was binding force. Because the judgment in Hamilton I was vacated, that decision, of course, is a nullity and as such has no binding force." Id. (citation omitted).

111. With the scope of review thus defined, the California Supreme Court reexamined Hamilton I in its entirety, and affirmed the judgment of death pursuant to Anderson. In applying Anderson, the California Supreme Court recognized that "there was no evidence that [petitioner] was an aider and

abettor." Hamilton II, 45 Cal.3d at 364. Therefore, "the court did not err by failing to instruct on intent." Id. Because the California Supreme Court concluded that the trial judge was not required to instruct on intent, it declined to reach the issue of whether the failure to so instruct constituted harmless error under Rose. Id.

B. Conclusions of Law

47. This court concludes that petitioner suffered no constitutional deprivation as a result of the California Supreme Court's application of Anderson in Hamilton II. After the United States Supreme Court vacated Hamilton I, the California Supreme Court was procedurally free to reexamine all aspects of its initial decision, including its erroneous conclusion that the trial court was required to instruct on intent to kill. Petitioner's death sentence has been

rendered neither arbitrary nor unreliable by the California Supreme Court's decision in Hamilton II.

48. Nor does the doctrine of law of the case preclude the California Supreme Court's reexamination if its earlier ruling. Indeed, the doctrine recognizes an exception where there has been an intervening change in the law. See George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd., 49 Cal.3d 1279, 1291 (1989).

49. Moreover, the California Supreme Court's retroactive application of Anderson does not constitute a violation of the constitutional prohibition against ex post facto laws. The California Supreme Court has explicitly held that there is no violation of federal due process where Anderson is applied to felony murders occurring before Carlos, as in this case.

People v. Poggi, 45 Cal.3d 306, 327 (1988), cert. denied, 492 U.S. 925 (1989). Most importantly, "Carlos itself concluded that the statute was ambiguous with respect to the requirement of intent to kill for a felony-murder special circumstance." Id. Therefore, "[t]here was ample basis for pre-Carlos foreseeability of a holding that such intent is not required for the actual killer." Id. With respect to petitioner's assertion of federal rights, this court agrees with the Poggi analysis. Cf. In re Baert, 205 Cal.App.3d 514 (1988) (ex post facto principles require Carlos instruction where crime occurred during four year window between Carlos and Anderson), cert. denied, 109 S.Ct. 3242 (1989).

50. In addition, the California Supreme Court's decision in Hamilton II does not constitute an equal

protection violation. When the state prosecutes criminal defendants, the results for those similarly situated will not always be consistent, for a variety of procedural and substantive reasons. However, in alleging an equal protection violation, petitioner must do more than challenge the timing of the decisions rendered through the appellate process. The mere fact that said timing created an unfortunate result from his perspective will not support the conclusion that the criminal laws are being disparately enforced to his constitutional detriment.

51. Nor does the California Supreme Court's failure to notify the parties of its intent to apply Anderson constitute a violation of procedural due process. There is no federal constitutional right which requires that petitioner be allowed to brief every single issue presented to the

appellate court. With respect to petitioner's alleged state entitlement under Cal. Govt. Code § 68081, any error under that section does not give rise to a federal claim for relief under § 2254. At any rate, the alleged failure to comply with Cal. Govt. Code § 68081 was harmless as the application of Anderson to this case was unavoidable and straightforward.

52. Finally, even if the California Supreme Court erred by going beyond the scope of the remand order and/or by applying Anderson retroactively, this court holds as a matter of law that such error was harmless as Rose clearly mandated reversal of Hamilton I. The failure of the trial court to instruct on intent to kill in this case was harmless under Rose as the evidence conclusively demonstrated that the victim was killed intentionally. See Hamilton I, 41 Cal.3d 408, 438 ("[T]he condition of Mrs.

Buchanan's body amply established an intent to kill in the absence of any evidence in the record supporting the majority's accidental death theory . . . . It is simply inconceivable that, if the killing were indeed 'accidental,' defendant would have neglected to attempt to prove that fact.") (Lucas, J., dissenting). Therefore, the reversal of Hamilton I was inevitable even if the California Supreme Court had not acted in the manner now challenged by petitioner.

VIII. ALLEGED IMPROPER JURY INSTRUCTIONS

A. Mandatory Sentencing Instruction

(a) Findings of Fact

112. At the close of the penalty phase, the jury was instructed pursuant to former CALJIC No. 8.84.2, which incorporated the mandatory sentencing language of Cal. Penal Code 190.3:

> After having heard all of the evidence, and after having heard

> and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole.

70 R.T. 4669.

113. At petitioner's request, the court also instructed the jury, "In weighing the aggravating and mitigating factors you are not to merely count numbers on either side. You are instructed rather to weigh and consider the factors on each side as a whole." Id. at 4664 (emphasis supplied).

114. During his penalty phase argument, the prosecutor stated, "The issue of determining the punishment

for these horrendous crimes rests in your discretion, guided by some factors, but not limited to those factors . . . . [I]t is going to be your decision. You are the members of the community and you are the conscience of the community, and you will be called upon to make this tremendous decision, tough decision . . . ." Id. at 4620. Near the end of his argument, the prosecutor observed, "So, ladies and gentlemen, you are the ones who have to add up and come to the total how does the alleged mitigation stack up against the overwhelming aggravation." Id. at 4641.

115. During his penalty phase argument, Ryan stated, "[I]t is for the jury to determine the appropriate punishment. If you find that one single factor in mitigation is sufficient to return a verdict of life without the possibility of parole, that is your choice." Id. at 4650. Near the end of

his argument, Ryan informed the jury, "You ladies and gentlemen are never going to be asked to make such a decision again. You are going to be asked whether or not this man lives or dies,and it is your decision." Id. at 4660.

(b) Conclusions of Law

53. Notwithstanding the California Supreme Court's recognition that former CALJIC 8.84.2 "leave[s] room for some confusion as to the jury's role," People v. Brown, 40 Cal.3d 512, 544, n.17 (1986), rev'd on other grounds, 479 U.S. 538 (1987), the United States Supreme Court has explicitly upheld the constitutionality of the instruction. Boyde v. California, 110 S.Ct. 1190 (1990).

54. In Boyde, petitioner claimed that the instruction violated the eighth amendment because it prevented the jury from making an individualized

assessment of the appropriateness of the death penalty. Id. at 1196. The Court rejected this argument, finding that "the mandatory language of CALJIC 8.84.2 is not alleged to have interfered with the consideration of mitigating evidence." Id. The Court concluded that "[p]etitioner's claim that the `shall impose' language of CALJIC 8.84.2 unconstitutionally prevents `individualized assessment' by the jury is thus without merit." Id.

55. In this case, petitioner's attempt to distinguish Boyde is wholly unpersuasive. While in Boyde there was no allegation that the mandatory language interfered with consideration of the mitigating evidence, here there is simply no evidence suggesting such interference. This court concludes that the supplemental instruction given by the court, as well as the closing arguments of

the prosecutor and defense counsel, clearly indicate that the jury was able to perform an individualized assessment of the appropriateness of the death penalty and did not mechanically weigh the factors in reaching its decision.

56. Furthermore, the disputed instruction did not create an unconstitutional presumption that death was the appropriate penalty, as it allowed the jury to consider all factors in mitigation, and to reject the death penalty even if only one mitigating factor persuaded them that life imprisonment was the appropriate penalty. The prosecutor's closing argument, including his comment with respect to the victim, do not alter the conclusions of this court.

57. For these reasons, this court concludes that the use of the mandatory sentencing language under these

circumstances was not constitutionally impermissible.

B. The Factor (k) Instruction

(a) Findings of Fact

116. After Ryan presented his penalty phase case, which consisted almost entirely of evidence of petitioner's character and background, see R.T. 4587-4613, the court instructed the jury pursuant to CALJIC 8.84.1: "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall take into account and be guided by the following factors, if applicable." 70 R.T. 4662. Among the factors to be considered was former factor (k): "Any other circumstance which extenuates the gravity of the crime even though it was not legal excuse for the crime." (Id. at 4664.

117. After instructing the jury on the factors to be considered, the court stated, "The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence on Mr. Hamilton. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death penalty." Id at 4664-65.

118. The prosecutor argued that "[t]here is (sic) absolutely no extenuating circumstances whatsoever, no extenuating circumstances in the way that he beat, robbed and kidnapped and killed that poor victim." Id at 4636. After restating the absence of any extenuating

circumstances, and while still arguing on this issue, the prosecutor observed, "He doesn't even have the broken home excuse. He had a good home life." Id. The prosecutor then attempted to rebut certain of the mitigating circumstances presented by the defense, all of which went to the victim's background. Id. at 4637-39.

(b) Conclusions of Law

58. Notwithstanding the California Supreme Court's conclusion that the language of factor (k) might mislead jurors about the scope of their discretion, People v. Easley, 34 Cal.3d 858 (1983), the United States Supreme Court upheld the constitutionality of factor (k) as used in this case. Boyde, 110 S.Ct. at 1201.

59. In Boyde, as here, petitioner claimed "that the 'catch-all' factor (k) did not allow the jury to consider and give effect to non-crime-

related mitigating evidence because its language . . . limits the jury to other evidence that was related to the crime." Boyde, 110 S.Ct. at 1197. In considering factor (k), the Court established the standard to be applied by this court: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id. at 1198.

60. In upholding the constitutionality of factor (k), the Court observed that "[p]etitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence

less than death." Id. at 1199. The Court squarely rejected petitioner's contention that the language of factor (k) limited the jury's consideration only to circumstances directly related to the crime. Id. at 1199.

61. Moreover, the Court noted that when factor (k) is considered in the context of the other factors, which do allow for consideration of mitigating evidence not associated with the crime itself, "it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence." Id. The Court further reasoned that all of the defense evidence presented at the penalty phase related to petitioner's background and character, "and we think it unlikely that reasonable jurors would believe the court's instructions transformed all of this

'favorable testimony into a virtual charade.'" Id. (quoting California v. Brown, 479 U.S. 538, 542 (1987)).

62. Finally, the Court also considered petitioner's contention that "arguments by the prosecutor immediately before the jury's sentencing deliberations reinforced an impermissible interpretation of factor (k) and made it likely that jurors would arrive at such an understanding." Id. at 1200. With respect to this allegation, which is identical to that made by petitioner here, the Court noted that "arguments of counsel generally carry less weight with a jury than do instructions from the court." Id. In Boyde, as here, the prosecutor's "principal tack was not to contend that background and character were irrelevant, but to urge the jury that despite petitioner's past difficulties, he must accept responsibility for his actions."

Id. at 1200. The Court concluded that this type of argument did not unconstitutionally taint factor (k).

63. Again, petitioner's attempt to distinguish Boyde is singularly weak. In this case, the jury received substantial evidence concerning petitioner's background and character, which the prosecution strenuously and properly attempted to rebut. Moreover, the trial court in this case explicitly informed the jury that they were not limited in considering only those factors in mitigation which he had listed. In addition, as the Court has instructed, factor (k) must be viewed in the context of the other factors, which do allow for non-crime mitigating evidence. Therefore, it is clear that there is absolutely no likelihood that the jury applied factor (k) in a way that prevented the

consideration of petitioner's background and character evidence.

64. For these reasons, this court concludes that the use of factor (k) under these circumstances was not constitutionally impermissible.

C. Modified Briggs Instruction

(a) Findings of Fact

119. At the time of petitioner's trial, state law mandated that the trial court instruct the jury on the Governor's authority to commute a life sentence, even where such sentence was imposed without possibility of parole. See former Cal. Penal Code § 190.3; former CALJIC 8.84.2. The so-called Briggs instruction provided in relevant part:

> You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to

> a lesser sentence that would include the possibility of parole.

After Ryan objected to the instruction, the parties reached an agreement on a modified Briggs instruction, which began with the language quoted above, but contained the following substantial explanatory provisions:

> This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper authorities. You are now instructed, however, that the matter of a possible commutation or modification of sentence is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur. It is not your function to decided now whether this man will be suitable for parole at some future date. So far as you are

> concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment without possibility of parole is the proper sentence, you must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Governor and other officials will properly carry out their responsibilities.

70 R.T. 4667-69.

120. During the penalty phase argument, the prosecutor stated, "This defendant wouldn't spend all his time in prison thinking about his horrible crimes. He'd be conniving and devising ways to manipulate the system and get out." Id. at 4645-46. Petitioner claims that this statement, because it implied he

might be able to get out of prison, eviscerated the court's attempts to instruct the jury that they were not to consider petitioner's potential for parole.

(b) Conclusions of Law

65. In California v. Ramos, 463 U.S. 992 (1983), the Court upheld the constitutionality of the unmodified Briggs instruction. The Court held that the instruction "gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." Id. at 1004. Moreover, the Court rejected the defendant's contention that the Briggs Instruction is constitutionally infirm because it deflects the jury's focus from its central task." Id. at 1005. "In sum, the Briggs

Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process." Id. at 1013.[11/]

66. The modified Briggs Instruction given in this case is not constitutionally infirm, even when considered in connection with the prosecutor's remark anticipating petitioner's future attempts to get out of prison. Most importantly, the modifications agreed to by the parties improved the unmodified Briggs Instruction from the defense perspective. In this regard, it should be noted that the impetus behind the modification came from petitioner's trial counsel, who was

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11. On remand, the California Supreme Court found the Briggs Instruction incompatible with the state constitution. People v. Ramos, 37 Cal.3d 136, 153 (1984). This result, of course, does not affect this court's inquiry of a federal habeas petition.

seeking to mitigate the impact of the unmodified Briggs Instruction.

67. The modifications accepted by the court operated to petitioner's benefit in two ways. First, the information concerning the actual logistics of commutation suggest that the possibility of parole for petitioner in this case is remote. This counteracts the potentiality that a jury may impose death simply because of its fear that a life sentence will be substantially shortened by the authorities. Second, the admonition not to consider the possibility of modification or commutation is significant, and there is nothing in the record which would lead this court to speculate that the jury either did not hear or did not listen to the trial judge's admonition. See Boyde, 110 S.Ct. at 1200 (impact of jury instructions not lessened by contrary arguments by counsel;

instructions are "viewed as definitive and binding statements of the law").

68. The prosecutor's remark described above, see Finding of Fact 120, does not change this result, nor does it suggest that the jury was encouraged to speculate as to whether petitioner was likely to be paroled. Taken in context, it is clear that the prosecutor's contention was not directed, either implicitly or explicitly, towards the commutation power of the governor. Rather, this court concludes that the comment, which refers primarily to petitioner's lack of remorse, reflects the prosecutor's proper desire to convey to the jury petitioner's manipulative personality and inability to think of anybody but himself. Therefore, the comment did not taint the modified Briggs Instruction.

69. For the reasons stated above, this court concludes that the reading of the modified Briggs Instruction was not constitutionally infirm.

IX. ADJOURNMENT OF THE JURY DURING DELIBERATIONS

A. Findings of Fact

121. On December 18, 1980, after the jury had deliberated for approximately 2.5 days, the court consulted with the jury and ordered an adjournment of deliberations until January 5, 1981. 65 R.T. 1. The court ordered the adjournment because of the pendency of the holidays and at least one juror's inability to deliberate in the week immediately preceding Christmas. Id.

122. Petitioner claims that he never assented to the adjournment, and petitioner has testified before this court that he protested to trial counsel,

who did not enter a formal objection. IV E.H. 161-62.

123. Petitioner has not introduced juror affidavits or other evidence suggesting that any of the jurors acted improperly during the break by discussing the case with others or by failing to avoid media coverage of the case.

B. Conclusions of Law

70. The trial court did not abuse its discretion in ordering the adjournment. It is well within the province of the court to allow a deliberating jury to break for the holidays; to hold otherwise would virtually ensure the unavailability of jurors to serve on long trials.

71. Even if the adjournment violated some discrete aspect of state law, see e.g., People v. Santamaria, 229 Cal.App.3d 269 (1991) (no

good cause for eleven day adjournment after one day of deliberations, where only reason for adjournment is trial judge's unspecified plans), this court concludes that such violation did not render the trial fundamentally unfair. Accordingly, petitioner was not deprived of his constitutional right to due process.

X. PETITIONER'S CLAIMS FILED IN PROPRIA PERSONA

A. Findings of Fact

124. As noted above, although petitioner's counsel filed an amended petition on his behalf, petitioner was permitted to file amendments in propria persona to the petition in consolidated case 90-0291-B. See supra note 4 and accompanying text. Although petitioner has been represented by highly competent counsel in these proceedings, his perpetual dissatisfaction with his appointed attorneys convinced this court

that the pro per petition and its amendments should not be considered precluded by or subsumed under the amended petition filed by counsel.[12/] By this method, the court sought to ensure that petitioner's interests were protected by counsel, while at the same time allowing

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12. While petitioner's dissatisfaction with counsel in this proceeding has been perpetual, it has never been meritorious. The court has denied petitioner's motions to relieve one or both habeas counsel on three occasions. See Nunc Pro Tunc Order, December 17, 1990 (finding "no evidence suggesting that Mr. Benzian has provided ineffective assistance of counsel . . . ."); Order, January 23, 1991 ("The court views petitioner's request to relieve both counsel as a dilatory tactic, and the court notes that in its view both counsel are working diligently and effectively on behalf of petitioner."); Order, August 19, 1991 (The court's conclusions with respect to counsel's performance have only been reinforced by effective representation during evidentiary hearing and in post-hearing brief). Notwithstanding these orders, the unique posture of this case led the court to conclude that petitioner should not be silenced merely because his counsel were diligently pursuing those claims which they believed were legally and factually sound.

petitioner to assert all claims which he believed appropriate, even if counsel, for strategic reasons or otherwise, did not.

125. Respondents were ordered to respond to the pro per amendments, and petitioner was allowed to file his own traverse to that response. See Nunc Pro Tunc Order, December 17, 1990, para. 1; Order, January 23, 1991, para. 3.

126. The court's objective has never changed: a full and fair adjudication of all appropriate claims in one timely proceeding. Notwithstanding respondents' protests to petitioner's pro per role, see Answer on the Merits to Pro Per Petition for Writ of Habeas Corpus by Prisoner Represented by Counsel, p. 7, the court finds that this unusual procedure has been appropriate in the unique context of this case, as petitioner's counsel have provided extensive and learned assistance,

while petitioner has been afforded every opportunity to put before the court all claims which he contends had been previously ignored.

127. In the pro per petition filed in 90-0291-B on March 7, 1990, and the pro per amendments thereto, filed on October 18, 1990, petitioner has raised four grounds in support of his request for relief: (1) false representation of the facts and evidence by the prosecution; (2) ineffective assistance of counsel at trial and on appeal; (3) denial of right to self-representation; (4) denial of the right to fair trial and due process.

128. Petitioner's first claim, false representation of the facts and evidence by the prosecution, alleges that the district attorney improperly introduced the knife, saw, and rope, and further alleges that the district attorney

"covered up" perjury by deputy coroner Cogen.

129. Petitioner's second claim, ineffective assistance of counsel, alleges that trial and appellate counsel failed to investigate certain evidentiary items. This claim also raises the issue of Ryan's shackling request and Ryan's trial performance.

130. Petitioner's third claim, denial of the right to self-representation, alleges that the trial judge improperly denied petitioner's timely Faretta motions.

131. Petitioner's fourth claim, denial of the right to a fair trial and due process, alleges that the trial court was prejudiced against petitioner, improperly admitted certain evidentiary items, improperly instructed the jury, and systematically excluded black jurors. Moreover, petitioner alleges that the

California Supreme Court exceeded its scope of review upon remand in Hamilton II, and improperly denied his motions to relieve or appoint specified counsel on four occasions. Finally, petitioner alleges in this claim that the California Appellate Project utilized racial prejudice in appointing counsel for petitioner in February, 1990.

132. This court has carefully considered the extremely limited factual allegations supporting each ground for relief, and has reviewed the trial record in connection with each of petitioner's pro per claims.

B. Conclusions of Law

72. Petitioner's allegations concerning the district attorney's introduction of the knife, rope, and saw were raised by counsel, and are foreclosed by this court's ruling that the admission of this evidence did not

deprive petitioner of a fair trial. See supra Conclusions of Law 44-46. Moreover, petitioner's claim that the district attorney engaged in a "cover-up" of perjured testimony is unsupported by any evidence in the trial record or the evidentiary hearing record, and must be summarily dismissed.

73. Petitioner's claim of ineffective assistance of trial counsel was raised by counsel and is foreclosed by this court's ruling that petitioner was represented in an effective and constitutional manner. See Conclusions of Law 14, 23-26. The court recognizes that the pro per petition asserts a number of alleged investigative and performance failures that were not discussed above. However, upon review of these allegations, the court finds that petitioner has failed to raise a constitutional issue inasmuch as each allegation involves evidentiary

minutiae and does not even approach the standard of incompetence and prejudice articulated in Strickland. To the extent petitioner contends that appellate and/or habeas counsel were also deficient for failing to investigate these issues, the same conclusion applies.

74. Petitioner's Faretta claim was raised by counsel and is squarely foreclosed by this court's ruling that petitioner moved to represent himself in an equivocal manner and for purposes of delay. See Conclusions of Law 36-43.

75. Petitioner's claim that the trial court improperly admitted evidence was raised by counsel and is foreclosed by this court's ruling that the evidence was legally admissible and the trial was conducted in a procedurally fair manner. See Conclusions of Law 44-46. The court recognizes that the pro per petition addresses certain evidentiary

decisions not raised in counsel's petition. However, the court concludes that the questioned rulings involve discrete evidentiary items and do not implicate petitioner's constitutional right to a fair trial.

76. Petitioner's attack on the jury instructions was raised by counsel and is foreclosed by this court's prior ruling that the instructions were not unconstitutional. See Conclusions of Law 57, 64, 69. Likewise, petitioner's attack on the California Supreme Court's decision in Hamilton II was raised by counsel and is foreclosed by this court's ruling that the decision was a lawful exercise of that court's power. See Conclusions of Law 47-52.

77. Petitioner has presented absolutely no evidence indicating that the trial judge was prejudiced against him or that black

jurors were systematically excluded from the jury. These very serious charges are made in a conclusory fashion in the pro per petition, and are totally unsupported in the record. Therefore, these claims warrant summary dismissal.

78. Petitioner's claim that the California Supreme Court improperly denied his motions to relieve or appoint counsel are unsupported by the record and do not raise constitutional issues. These claims reflect petitioner's misguided belief that he is entitled to counsel of his choice throughout appellate and habeas proceedings. The constitution does not afford petitioner this luxury, and his claims are wholly without merit. Likewise, petitioner's claim that the California Appellate Project utilized racial prejudice in appointing him counsel is unsupported by any evidence. These claims warrant summary dismissal.

79. As noted above, many of the pro per claims raised by petitioner were pursued by counsel and have already been addressed by this court. With respect to the claims prosecuted by petitioner in propria persona, this court concludes that said claims are unsupported by any evidence and/or do not state issues of constitutional magnitude. Instead, these claims reflect petitioner's willingness to assert frivolous claims in an effort to delay the proceedings, manipulate the judicial system, and obfuscate the real issues. This court's reading of the trial record indicates that this has been petitioner's objective since he was first arrested and launched the "Fran and Spider" story.

XI. CLAIMS WHICH ARE SPECIFICALLY BARRED FROM SUBSEQUENT PETITIONS

A. Findings of Fact

133. As discussed above, see supra p. 4, petitioner was ordered by this court on March 6, 1990 to identify all potential habeas claims of which he was aware. On June 8, 1990, petitioner filed a list of 36 potentially new claims. Subsequently, petitioner was given until October 22, 1990 to file any unexhausted claims in state court and any exhausted claims in federal court. This court ruled that any claims not brought by the deadline were waived and abandoned.

134. The following claims were identified in petitioner's list of potential claims filed with this court on June 8, 1990: (1) failure to investigate the Jessie Moffett theory; (2) petitioner's inability to communicate effectively with counsel by reason of

mental or emotional impairment; (3) counsel's failure to raise this inability; (4) denial of expert psychiatric assistance; (5) introduction of evidence obtained by government officials incident to petitioner's unlawful arrest; (6) introduction at trial of petitioner's statement to Deputy Parsons in violation of the fifth amendment; (7) introduction at trial of petitioner's statement to a police informant; (8) unlawful jury instruction stating that adverse inferences could be drawn from petitioner's failure to explain or deny evidence against him during his testimony; (9) ineffective assistance of counsel based on trial counsel's failure to seek a change of venue; (10) selection of jury in a manner that violated the right to a jury representing a fair cross-section of the community; (11) improper exercise of peremptory challenges by prosecution; (12)

improper communication between trial court and jurors outside of presence of counsel; (13) excessive security during trial; (14) improper admission of (a) knife, saw, and rope, (b) petitioner's 1972 burglary conviction; (c) petitioner's statements to Donna Hatch; (d) petitioner's letter to Terry Buchanan; (e) petitioner's letter to Theresa Roch; (15) improper admission into evidence of preliminary hearing testimony of Stephen Terry; (16) improper denial of Faretta motions; (17) improper admission of petitioner's 1972 burglary conviction (repeat of 14(b)); (18) trial court's failure to instruct jury on theft as a lesser included offense of robbery; (19) improper jury instruction indicating that petitioner's 1972 burglary conviction could be used as evidence of motive; (20) improper jury instruction indicating that evidence of the presence of motive could tend to establish guilt; (21) improper

jury instruction that flight after the commission of a crime may be considered as consciousness of guilt; (22) improper jury instruction on malice aforethought; (23) use of unconstitutional felony murder and special circumstances statute; (24) imposition of death penalty in a disproportionate and discriminatory manner when compared with sentences in other cases involving defendants and victims of other races; (25) improper burglary instruction; (26) improper jury instruction indicating that auto burglary may serve as a basis for first degree felony murder and special circumstances; (27) improper exclusion of documentary film during sentencing phase; (28) improper penalty phase instructions that precluded the jury from considering and giving effect to all relevant mitigating evidence; (29) failure to instruct the jury that death penalty verdict could be

returned only if death was the appropriate penalty beyond a reasonable doubt; (30) failure to instruct the jury that a death sentence can also be commuted by the governor; (31) failure to instruct the jury that robbery, burglary, and kidnapping should be regarded as a single special circumstance; (32) refusal of the court to exclude aggravating factors that were not listed on the prosecutor's notice of aggravation; (33) improper instruction on irrelevant mitigating factors and prosecutor's argument pointing out absence of such factors; (34) prosecutorial misconduct in penalty phase argument; (35) ineffective assistance of counsel with respect to investigation and presentation of potential mitigating factors; and (36) to the extent any of the above claims were not preserved, ineffective assistance of trial and appellate counsel for failing to preserve such claims.

135. Of the 36 potential claims identified on June 8, 1990, only the following five were presented to this court prior to the October 22, 1990 deadline: (6) improper admission of statement to Deputy Parsons; (11) improper use of peremptory challenges by prosecution; (14) improper admission of certain evidentiary items; (16) improper denial of Faretta motions; and (28) improper penalty phase instruction that limited jurors' consideration of mitigating evidence. Each of these claims, and all other exhausted claims presented to the court in a timely manner, have been considered by the court. None of the other claims identified above were presented to this court prior to the October 22, 1990 due date.

136. One of the claims identified by petitioner on June 6, 1990, the alleged "Jessie Moffett theory," was

raised by petitioner nearly thirteen months later, in support of his Application for Stay of Proceedings, filed with this court on July 1, 1991. This application came approximately two months after the evidentiary hearing conducted by this court was concluded, and marked the first time that petitioner ever attempted to develop the Moffett theory before this court, despite its identification in June, 1990, and despite petitioner's admission that he received discovery giving rise to the theory in March, 1990. This court denied the application for stay, finding that petitioner's wilful disregard of the October 22, 1990 deadline required that the Moffett theory be deemed waived and abandoned. See Order, August 19, 1991. Petitioner's attempt to raise the claim at this stage of the proceedings reflects an attempt to file seriatim petitions and

amendments, and is precluded by this court's earlier orders.

B. Conclusion of Law

80. Those claims listed above and not presented to this court prior to the October 22, 1990 deadline are hereby deemed waived and abandoned pursuant to this court's order of September 18, 1990. This ruling specifically encompasses all claims listed in Finding of Fact 132, as well as any other claims of which petitioner was aware, which were not filed with this court prior to October 22, 1990.

XII. Conclusion

This court recognizes its role as a guardian of those constitutional rights guaranteed to every criminal defendant. Of course, in a capital case the importance of this role is magnified by an immeasurable amount. Accordingly, the court has given its maximum consideration

to every claim raised by petitioner, and has done everything in its power to analyze whether petitioner's trial was conducted in a constitutional manner.

Without prejudicing the valid rights of respondents, this court has endeavored to afford petitioner every opportunity to present all claims to this court on a fully developed record. This effort included a three week evidentiary hearing which only concluded when petitioner rested. Meanwhile, the state has been forced to answer and litigate many issues of dubious constitutional importance, all the while holding a judgment of death that now approaches its eleventh anniversary.

After carefully considering every claim presented, this court is convinced that petitioner received a fair trial and was convicted and sentenced in a constitutional manner. For all of the reasons described above, the amended and

consolidated petitions for writ of habeas corpus are hereby denied.

IT IS SO ORDERED.

DATED: 8-23-91
3:30 pm

/S/ RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

Hamilton v. Vasquez and Lungren
Civ. No. 86-2102-B and Civ. No. 90-0291-B
Order Denying Petitions for Writ of Habeas Corpus; Findings of Fact and Conclusions of Law

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APPENDIX C

NOT FOR PUBLICATION
UNITED STATES SUPREME COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed March 31, 1994

BERNARD LEE HAMILTON,	)	Nos. 91-56251
	)	91-56252
Petitioner-Appellant,	)	91-56295
	)	91-56403
vs.	)	91-80385
	)	93-55039
DANIEL VASQUEZ, * Warden of San Quentin; THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,	)	D.C. Nos. CV-86-2101-RMB
	)	CV-90-291-RMB
Respondents-Appellees.	)	
	)	ORDER

Before: SCHROEDER, Circuit Judge.

Pursuant to Federal Rule of Appellate Procedure 41(b), the Motion to Stay Issuance of Mandate is GRANTED for 30 days form the date of this order.

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* Arthur Calderon, the current Warden of San Quentin, is substituted for Daniel Vasquez, the former Warden. See Fed. R. App. Pro. 43(c)(1).

MOTION FILED
MAY 19 1994

No. 93-1652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR CALDERON,
Warden, San Quentin State Prison, et al.,
Petitioners,

vs.

BERNARD LEE HAMILTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

1. Does a federal court create a "new rule" when it accepts an argument previously rejected by this Court, based on a minor variation in the facts?

2. Are the precedents established by this Court limited to the exact facts of the case, or do they establish principles of broader application?

3. Does a federal court impermissibly create a "new rule" on habeas corpus when it creates a new exception to the general rule that juries are presumed to follow their instructions?

4. Can a convicted criminal be found to be "in custody in violation of the Constitution . . . of the United States" based on an instruction to which he agreed?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR CALDERON,
Warden, San Quentin State Prison, et al.,
Petitioners,

vs.

BERNARD LEE HAMILTON,
Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that (1) the Ninth Circuit's disregard of the *Ramos* precedent calls for a writ of certiorari to reestablish the binding force of this Court's precedents; (2) the Ninth Circuit's radical new exception to the principle that juries are presumed to follow their instruction has impermissibly created a new, and wrong, rule on habeas corpus; (3) modifications to a constitutional instruction agreed to by competent counsel cannot be a denial of due process; and (4) this case impacts other states besides California.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The costs of habeas review are bad enough when the federal courts merely second-guess the state courts on close questions. They become intolerable when federal courts set aside judgments of state courts which have faithfully followed this Court's precedents, based on the lower federal court's thinly veiled disagreement with those precedents. This is such a case, and it is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

May, 1994

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR CALDERON,
Warden, San Quentin State Prison, et al.,
Petitioners,

vs.

BERNARD LEE HAMILTON,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Fifteen years ago, Bernard Hamilton murdered Eleanore Buchanan, the young mother of two infant sons. He cut off her head and hands, which have never been found. Pet. for Cert. 2-3. It would appear that he did this for the purpose of preventing identification; he boasted after his arrest that the charge would not stick, because the police could not identify the body. In fact, they could and did. *People* v. *Hamilton*, 41 Cal. 3d 408, 416, 710 P. 2d 981, 985 (1985) ("*Hamilton I*").

Hamilton was convicted of murder in the first degree. *None* of the 15 jurists who have examined this exhaustively litigated case so far has found any ground for overturning that verdict. *Id.*, at 432, 710 P. 2d, at 995-996; *id.*, at 436, 710 P. 2d, at 999 (Grodin, J., concurring in the judgment); *ibid.* (Bird, C. J., concurring); *id.*, at 437, 710 P. 2d, at 999

(Lucas, J., concurring in part and dissenting in part); *id.*, at 439, 710 P. 2d, at 1000 (Mosk, J., concurring in part and dissenting in part); *People* v. *Hamilton*, 45 Cal. 3d 351, 363, 753 P. 2d 1109, 1117 (1988) ("*Hamilton II*"); *id.*, at 380, 753 P. 2d, at 1128 (Broussard, J., concurring in part and dissenting in part); App. to Pet. for Cert. B-272 (district court); *Hamilton* v. *Vasquez*, 17 F. 3d 1149, 1166 (CA9 1994); *ibid.* (Trott, J., concurring in part and dissenting in part).

At the time of trial, a California statute required that juries be informed of the possibility of commutation of a life-without-parole sentence. Hamilton's trial counsel objected to any such instruction being given, but after that objection was overruled, he consented to the modifications made to the basic instruction. *Hamilton* v. *Vasquez*, 17 F. 3d, at 1161.

In *Hamilton I*, the California Supreme Court reversed the finding of a special circumstance (*i.e.*, death eligibility) on the ground that the jury was not instructed on intent to kill as an element of felony murder. 41 Cal. 3d, at 431-432, 710 P. 2d 995-996. This Court vacated and remanded for harmless error analysis in light of *Rose* v. *Clark*, 478 U. S. 570 (1986). *California* v. *Hamilton*, 478 U. S. 1017 (1986). On remand, after it had decided that intent was not an element of felony murder if defendant was the actual killer, the California Supreme Court affirmed the entire judgment and denied two habeas petitions. *Hamilton II*, 45 Cal.3d, at 363-364, 380, 753 P. 2d, at 1117-1128. One Justice dissented, solely on state grounds. *Id.*, at 380, 753 P. 2d, at 1128 (opinion of Broussard, J.).

The federal district court denied habeas relief on all grounds. App. to Pet. for Cert. B-273. The Court of Appeals panel divided 2-1, granting Hamilton a new penalty trial. *Id.*, at 1166; *ibid.* (dissent).

Thus, of the 10 jurists who have examined the penalty phase after this Court's remand, only 2 have found a federal constitutional error. Seven have found no basis for setting aside the judgment.

SUMMARY OF ARGUMENT

The panel majority's opinion violates this Court's precedents at every turn. The opinion fails to follow *California* v. *Ramos* because it claims, incorrectly, that the *Ramos* Court was mistaken about California law, and because of factual differences that do not affect the underlying basis for the *Ramos* decision. It invents misleading suggestions that are not in the instruction. It takes a rare exception to the principle that juries are presumed to follow their instructions and magnifies that exception into a new, and wrong, rule.

A more fundamental problem with this case deals with the core meaning of the root constitutional command, "nor shall any State deprive a person of life, liberty or property without due process of law." How can a modification to a constitutional instruction violate this command when competent defense counsel participates in its drafting and consents to the final product? *Amicus* submits that, given effective counsel, a consensual procedure is *per se* "due process."

ARGUMENT

I. The Ninth Circuit's failure to follow *Ramos* is a shocking case of judicial insubordination.

Among the "special and important reasons" calling for a writ of certiorari is the case "[w]hen . . . a United States court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10.1(c). If ever a case fit this description, this one does.

A. The Morse Factor.

In explaining its refusal to follow *California* v. *Ramos*, 463 U. S. 992 (1983), the panel majority said this:

> "The United States Supreme Court in *Ramos* did not permit the jury to speculate about the likelihood of the defendant's release on parole, for it *assumed* that the trial court would provide the jury with accurate information concerning the likelihood of commutation *and parole*.

> *Ramos*, 463 U.S. at 1004, 103 S.Ct. at 3455. Furthermore, the Court in *Ramos assumed* that the instruction did not preclude the defendant from offering any evidence regarding the Governor's power to commute a life sentence without possibility of parole. *Id.* However, California case law in effect at the time Hamilton was sentenced prevented defense counsel from showing the actual likelihood of a person ever being paroled if he were sentenced to life imprisonment. See *People* v. *Morse*, 60 Cal.2d 631, 36 Cal.Rptr. 201, 211, 388 P.2d 33, 43 (Cal. 1964).[3]
>
> ---
>
> "[3] In *Morse*, the jury was deciding between the death penalty and life with the possibility of parole."

Hamilton v. *Vasquez*, 17 F. 3d 1149, 1162 (CA9 1994) (emphasis added).

Even if the premises in this reasoning were true (which they are not), the statement would still be a breathtaking assertion by a lower court. The panel majority purports to examine a precedent of this Court, determine the state law predicates of the decision, decide that those predicates were wrong, and then reject the precedent.

The Court of Appeals simply does not have such authority. "But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982). Even *if* the *Ramos* Court really had "assumed" something about California law that was not correct, the precedent remains binding until this Court, not the Court of Appeals, overrules it. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983).

Yet the *Ramos* Court made no false assumption. By citing *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33 (1964), the Ninth Circuit has not discovered anything unknown to the *Ramos* Court. The Court knew about *Morse*, cited it, and discussed it. *Ramos*, *supra*, 463 U. S., at 1012.

The panel majority cites page 1004 for the proposition that *Ramos* "assumed" that information on the likelihood of

parole, as well as commutation, would be admissible. *Hamilton*, *supra*, 17 F. 3d, at 1162. In fact, *Ramos* only mentions "evidence or argument regarding the Governor's power to *commute* a life sentence." (Emphasis added.) There is no mention of likelihood of parole here. The portion of *Ramos* cited by the panel majority deals only with the possibility of commutation, while the portion of *Morse* cited deals only with the possibility of parole. They are not directly in conflict.

One could certainly have argued in 1981 that the prohibition on evidence of likelihood of parole from *Morse* should have been extended to cover likelihood of commutation. However, that argument would have raised the question of whether the evidentiary portion of *Morse* survived the enactment of California Penal Code section 190.3. Although California follows a strict rule of obedience to decisions of higher courts, *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal. 2d 450, 455, 369 P. 2d 937, 940 (1962), this rule is subject to "the well-settled principle that a decision prior to the enactment of a statute affecting the subject is not a controlling precedent." *Pacific Gas & Electric Co.* v. *Superior Court*, 33 Cal. App. 3d 321, 326, 109 Cal. Rptr. 10, 13 (1973).

On the precedents existing in 1981, defendant was not by any means precluded from making an offer of proof regarding likelihood of commutation and parole and arguing that pre-*Furman*[1] case law was inapplicable to a post-*Furman* sentencing statute. Eight years after Hamilton's trial, in a case where the defendant *had* belatedly proffered evidence of likelihood of commutation, the California Supreme Court upheld the trial court's refusal to reopen the penalty phase for that purpose. However, it did not rule on the ground of the *Morse* precedent, but rather because the trial court's instruction not to consider commutation had rendered the evidence irrelevant. *People* v. *Hunter*, 49 Cal. 3d 957, 983-984, 782 P. 2d 608, 623 (1989). Thus, it is by no means clear that the rule of

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1. *Furman* v. *Georgia*, 408 U. S. 238 (1972) required the rewriting of every state's capital sentencing law, including California's.

state law the panel majority relies on was actually in force at the time of the trial.

B. The Accuracy Issue.

The present case is also not distinguishable from *Ramos* on the ground of an inaccurate versus an accurate instruction. Here is the description of commutation and parole given to the jury:

> "You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power, a governor may, in the future, commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.
>
> "This is subject to the requirement that, in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years less one-third off for good time credits before parole may be considered by the proper authorities." *Hamilton* v. *Vasquez*, *supra*, 17 F. 3d, at 1173-1174.

The panel majority calls this description "confusing." *Id.*, at 1161. The majority then offers us this description of the commutation process:

> "In California, a person who is a twice-convicted felon such as Hamilton must apply directly to the Governor in order to have his sentence commuted. See Cal. Penal Code § 4802 (Deering 1992). The Governor, upon receipt of the application, must refer it to the Board of Prison Terms for an investigation and recommendation. *Id.* After the Board of Prison Terms makes its recommendation, it transfers the application along with the recommendation back to the Governor. See Cal. Penal Code § 4813 (Deering 1992). Even if the Board of Prison Terms recommends commutation, the Governor cannot commute a sentence of life without parole unless four justices of the

> California Supreme Court recommend commutation. See Cal. Penal Code §4852 (Deering 1992); California Constitution, Article 5 §8 (Deering 1981). Furthermore, even if both the Board of Prison Terms and four justices of the Supreme Court recommend commutation, the Governor has the authority to reject the recommendations. California Constitution, Article 5 §8 (Deering 1981)." *Id.*, at 1162.

There are two differences between the panel majority's description and the trial court's supposedly "confusing" and "inaccurate" description. First, the trial court's description is the clearer of the two. Second, the trial court omitted the mechanical detail of applying directly to the Governor and the ministerial duty of the Board of Prison Terms to investigate and make a recommendation.

The essence of the matter, however, is identical in both descriptions. The Governor and a majority of the California Supreme Court must agree before a commutation may issue. No one would surmise that the Governor of the nation's largest state would act without some kind of staff recommendation, and the fact that the Board of Prison Terms is charged with that task is a detail, not a "hurdle." Cf. *ibid.*

The panel majority also states, "The instruction as given incorrectly suggested that if the jury decided to sentence Hamilton to life without the possibility of parole, he would nevertheless be eligible for release." 17 F. 3d, at 1162. This "suggestion" is a figment of the majority's imagination. It does not appear in the instruction. The instruction correctly states that the possibility of parole can only arise through a gubernatorial commutation.

The instruction in the present case is just as accurate, for this case, as the instruction in *Ramos* was for Ramos' case. Supposed inaccuracy is no ground for the Court of Appeals' failure to follow *Ramos*.

C. The "Diversion" Argument.

Perhaps worst of all is the Court of Appeals' acceptance of the "diversion" argument. "In exercising [its] discretion, the jury must consider relevant mitigating evidence. [Cita-

tion.] The jury in this case was diverted from this task by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." 17 F. 3d, at 1162-1163.

This is precisely the argument squarely rejected by this Court in part II C of the *Ramos* opinion. 463 U. S., at 1005-1009. The *Ramos* Court did not simply reject that argument "in the circumstances of that case," as the opinion below implies. See 17 F. 3d, at 1160. *Ramos* rejected that argument as a matter of principle, based on the fundamental nature of the sentencing decision. The "diversion" argument fails because "there is no . . . 'central issue' [similar to guilt] from which the jury's attention may be diverted." *Ramos*, 463 U. S., at 1008. Certainly the defense evidence presented factors to be considered, but "the jury . . . is free to consider a myriad of factors," at this point, *ibid.*,[2] and it was on that basis, and not the specific wording of the instruction, that *Ramos* rejected the "diversion" argument, *id.*, at 1009.

"We note further that respondent [Ramos] does not, *and indeed could not*, contend that the California sentencing scheme violates the directive of *Lockett* v. *Ohio*, 438 U. S. 586 (1978)." *Id.*, at 1005, n. 19. This Court said in *Ramos* that the exact argument accepted by the Ninth Circuit in the present case was so far-fetched that it could not even be credibly made.

If the Ninth Circuit was not obliged to follow *Ramos* in the present case, then it is difficult to see how any precedent can ever be binding beyond its exact facts. "This is a classic case

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2. This case presents a prime example of why juries must be permitted to consider a myriad of factors in aggravation as well as mitigation. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Tuilaepa* v. *California*, No. 93-5131. The mitigation was a routine chorus of relatives and friends. See 17 F. 3d, at 1163. Weighed against this was Hamilton's callous mutilation of the body for the specific purpose of preventing identification. He trots out his own family to plead for him, but he so utterly lacks compassion for Eleanore Buchanan's family that, even after the guilt phase verdict, he did not reveal what he had done with her head, so they could at least give her a decent burial. See Pet. for Cert. 3.

of differences being insufficient to create a viable legal distinction." *Hamilton* v. *Vasquez*, *supra*, 17 F. 3d, at 1167 (Trott, J., dissenting). But precedents establish rules of broader application. "In short, the Court of Appeals has simply confused the factual contours of [*Ramos*] for its unmistakable holding." *Thurston Motor Lines*, *supra*, 460 U. S., at 535.

II. The Ninth Circuit created "new rules" by evading controlling precedent and by creating a new exception to the principle that juries are presumed to follow their instructions.

A. Teague and "the Merits."

Habeas corpus is not an appeal. *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). This obvious statement bears repeating because it is so frequently ignored. A court hearing an appeal asks whether the trial court erred. On habeas corpus, trial court error is relevant only to the extent that it bears on the sole question which a habeas court has jurisdiction to decide: whether the warden is breaking the law by holding the prisoner in custody. See *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830).

If the state courts obeyed the rules in effect at the time of both trial and appeal, then a subsequent change in the law does not render the prisoner's custody illegal. Attempts to distinguish the *Teague*[3] issue from the "merits," see, *e.g.*, *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 250-251, 114 S. Ct. 948, 957 (1994) (Steven, J., dissenting), thus miss the point. *Teague* is an essential part of the merits on the question of whether the prisoner is legally in custody.

The *Bohlen* majority implicitly recognized that *Teague* does go to the merits (although it used the same terminology as the dissent) when it held that the issue was "fairly included" in a question referring only to the merits. *Id.*, at 127 L. Ed. 2d, at 245, 114 S. Ct., at 953. Nonretroactivity is not

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3. *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion).

" 'analytically and factually' distinct" from the merits. See *ibid.*, S. Ct., at 952 (distinguishing *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993) (*per curiam*)).

Teague is not a procedural barrier that keeps illegally incarcerated prisoners in prison. *Teague* is a rule of substantive law defining what kinds of defects will render imprisonment illegal, despite the existence of an unreversed judgment by a competent court directing such imprisonment.

By creating a new rule on habeas corpus, the court below has not bypassed a mere barrier to reach an otherwise correct result. It has taken a wrong path and reached a wrong result. It has delayed justice by many years in a case where justice has already been much too long delayed. It has ordered a new trial even though the judgment is valid.

B. The Ramos Issue.

A rule favoring defendant is "new" for the purpose of this case if it was not *dictated* by precedent in effect on January 23, 1989. See *Teague*, *supra*, 489 U. S., at 301 (dictated); *Sawyer* v. *Smith*, 497 U. S. 227, 232 (1990) (date of finality is day cert. denied); *Hamilton* v. *California*, 488 U. S. 1047 (1989) (cert. denied in present case); cf. *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 191, 113 S. Ct. 838, 844 (1993) (*Teague* inapplicable to new rule validating judgment).

In this case, as in *Bohlen*, the only party who has a substantial argument that its position is dictated by precedent is the Attorney General. *Ramos* is as clearly on point in this case as *United States* v. *DiFrancesco*, 449 U. S. 117 (1980) was in *Bohlen*. See *Bohlen*, *supra*, 127 L. Ed. 2d, at 246-249, 114 S. Ct., at 954-956.

For reasons stated in part I of this brief and parts I and II of the Attorney General's certiorari petition, *amicus* believes that habeas relief would properly be denied even without the *Teague* rule. With the *Teague* rule, however, it is not necessary that the precedents foreclose Hamilton's argument. It is enough that they strongly suggest the opposite result. *Bohlen*, 127 L. Ed. 2d, at 248, 114 S. Ct., at 955. That *Ramos* most certainly does.

C. Jurors and Instructions.

Juries are generally presumed to follow their instructions. *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987); *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 367 (1963). The California Supreme Court applied this general rule in the present case. The trial judge instructed the jury not to engage in the kind of speculation condemned in *People* v. *Ramos*, 37 Cal. 3d 136, 153, 689 P. 2d 430, 439 (1984) (on remand, reinstating prohibition on independent state grounds), and the state court presumed that instruction was followed. *People* v. *Hamilton*, 45 Cal. 3d 351, 375, 753 P. 2d 1109, 1125 (1988). The Ninth Circuit held, in effect, that the California Supreme Court had violated the Constitution by applying the general, time-honored rule, rather than creating a new exception to it.

In *Bruton* v. *United States*, 391 U. S. 123 (1968), this Court created a narrow exception to the presumption of obedience. That case involved the introduction of powerful hearsay evidence directly stating the ultimate fact. At a joint trial, the prosecution introduced the confession of a codefendant, who did not testify and hence could not be cross-examined, which expressly named Bruton as a perpetrator. *Id.*, at 124. Given the powerful nature of the evidence, an instruction to disregard it as to Bruton could not remedy what would otherwise be a clear violation of a core constitutional right. *Id.*, at 137.

Just how narrow the *Bruton* exception is was made clear by subsequent cases. In *Richardson* v. *Marsh*, *supra*, 481 U. S., at 203, the confession had been edited to delete any reference to Marsh. Even though the evidence was inferentially incriminating, see *id.*, at 208, the Court applied the general presumption of obedience to instructions and not the *Bruton* exception. See also *Zafiro* v. *United States*, 122 L. Ed. 2d 317, 326, 113 S. Ct. 933, 939 (1993). The *Marsh* Court refused to extend the *Bruton* exception to a situation far more damaging to the defendant than the instruction in the present case.

The majority opinion below makes no attempt to distinguish *Marsh*. It does not discuss the narrow limits of the *Bruton* exception to the general rule. It simply quotes *Bruton*

as if it were the rule, rather than the exception, and moves on. See *Hamilton* v. *Vasquez*, *supra*, 17 F. 3d, at 1163.

By declaring, in effect, that the *Bruton* exception has swallowed the *Shotwell* rule, the court below created a new rule. And a wrong rule.

III. A person cannot be deprived of due process of law by reason of a procedure to which he agreed.

The basic "Briggs Instruction" is constitutional. *California* v. *Ramos*, 463 U. S. 992 (1983). The state law issues regarding the instruction have been resolved against Hamilton by the final authority on state law. *People* v. *Hamilton*, 45 Cal. 3d 351, 375, 753 P. 2d 1109, 1125 (1988). The only questions remaining, therefore, are federal-law objections to the modifications to the instructions.

Even though Hamilton, through counsel, agreed to these modifications, *Hamilton* v. *Vasquez*, 17 F. 3d 1149, 1161 (CA9 1994), the panel majority still held that they violated due process of law. *Id.*, at 1160. How can that be?

Volenti non fit injuria is a rule of substantive law, not a procedural bar. The "victim's" consent to a boxing match does not procedurally bar a prosecution for battery; consensual boxing is simply not a battery to begin with. See R. Perkins & R. Boyce, Criminal Law, ch. 2, §2, p. 154 (3d ed. 1982).

This Court drew the distinction clearly in *Peretz* v. *United States*, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991). In *Gomez* v. *United States*, 490 U. S. 858 (1989), the Court had held that federal magistrates could not conduct felony jury selection without the defendant's consent, but Peretz had, through counsel, expressly consented. *Peretz*, 115 L. Ed. 2d, at 815, 111 S. Ct., at 2663. The Court identified three cleanly separated questions: (1) whether the procedure violates the statute; (2) whether the procedure violates Article III; (3) if neither, whether defendant had waived his right to claim the error on appeal. *Id.*, 115 L. Ed. 2d, at 816, 111 S. Ct., at 2664. *Peretz* held that because defendant had agreed there

simply was no error. Hence the waiver question was moot. *Id.*, 115 L. Ed. 2d, at 824, 111 S. Ct., at 2671.

Similarly, the defendant's consent to the modifications in the present case do not waive an objection to a violation of due process. His consent negates the existence of any due process violation.

The Due Process Clause does not give this Court, much less the lower federal courts, supervisory authority over the state courts. *Spencer* v. *Texas*, 385 U. S. 554, 563-564 (1967); *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 397-398, 112 S. Ct. 475, 481 (1991). Disagreement with an instruction is not enough. This Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling* v. *United States*, 493 U. S. 342, 352 (1990).

The fact that a defendant, represented by competent counsel, agrees to a procedure is sufficient *by itself*, *amicus* submits, to take that procedure out of the "fundamental unfairness" category. One can, of course, imagine horror stories that would be fundamentally unfair even with consent, but consent to such procedures would necessarily be ineffective assistance. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).

In the present case, Hamilton's counsel would have preferred no Briggs Instruction at all, 17 F. 3d, at 1161, just as Peretz's counsel would doubtless have preferred no trial at all. But the statute was presumptively constitutional, and we now know that it does not violate the federal Constitution. Hamilton's counsel represented him effectively and obtained an instruction specifically directing the jury not to consider commutation, which was far better than the existing law at the time of trial entitled him to.

Hamilton was not denied due process by the modifications, because he consented to them.

IV. The issue in this case affects other states besides California.

The Attorney General has identified other California cases endangered by this decision. Pet. for Cert. 17. But this case goes beyond California. Commutation instructions are still being given in Illinois and Nevada. See *People* v. *Gacho*, 522 N. E. 2d 1146, 1165-1166 (Ill. 1988); *Petrocelli* v. *State*, 692 P. 2d 503, 509-511 (Nev. 1985).

The problem is especially acute in Nevada, whose judgments will eventually come before the Ninth Circuit. The ill-crafted opinion in this case gives the Nevada courts no firm basis for determining how they can craft an instruction that will comply with both their statutory mandate and the Ninth Circuit's new rule.

The opinion below contrasts the "two-sentence" instruction in *Ramos* with the longer instruction here, implying that length alone causes a supposedly impermissible "focus" on the commutation process. *Hamilton* v. *Vasquez*, 17 F. 3d 1149, 1162 (CA9 1994). Yet two paragraphs later the opinion contends that the jury was misled by not being informed of the administrative procedures for a clemency application. *Ibid.* Should a judge give more details, or fewer?

What will happen in the remaining California cases, where state *Ramos* error was found harmless, and in the Nevada cases? Federal district judges, who are bound to follow both *Ramos* and the present opinion, will have to pick through the details of each case, deciding on minor nuances whether it is more like one or the other. In such an environment, justice is more likely to be measured by the proverbial "chancellor's foot" than by the Constitution of the United States.

Unless this Court reaffirms that *Ramos* was based on a broad principle and not just the circumstances of the particular case, there will be a new area of litigatible issues in an area of law that already has far too many issues. There will be needless retrials of decade-old cases that were, in reality, correctly tried the first time. There will be further needless conflict between state courts duly endeavoring to follow *Ramos* and federal courts following the present opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

May, 1994

Respectfully submitted,

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ORIGINAL

Supreme Court, U.S.
FILED
MAY 18 1994
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No. 93 - 1652

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit properly set aside a state court death sentence because the penalty phase instructions, taken as a whole, provided the jury with inaccurate and misleading information regarding the likelihood that respondent would be paroled if not given a death sentence and which unduly emphasized California's commutation and parole procedures in violation of California v. Ramos, 463 U.S. 992 (1983), and because respondent had no opportunity to explain or deny the false and misleading information?

2. Can a federal court set aside a state court death sentence based on an instructional error in the penalty phase by applying the reasonable likelihood test of Boyde v. California, 494 U.S. 370 (1990), and without considering the harmless error test of Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), where petitioners waived any argument that Brecht would apply and never raised the issue of harmless error?

3. Does a federal court create a new rule of law within the meaning of Teague v. Lane, 489 U.S. 288 (1989), when it finds reversible error in an inaccurate and misleading modification of the penalty phase instruction on commutation where the unmodified instruction was deemed constitutional in California v. Ramos, 463 U.S. 992 (1983)?

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No. 93 - 1652

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

Respondent Bernard Lee Hamilton respectfully requests that this Court deny the petition for writ of certiorari filed by Petitioners Arthur Calderon and Daniel Lungren, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 17 F.3d 1149 (9th Cir. 1994) and is set forth in Appendix A to the Petition for Writ of Certiorari ("Appendix A").

CONSTITUTIONAL PROVISIONS

This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishment."

It also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that no state may "deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Respondent Bernard Hamilton was convicted of capital murder and sentenced to death on March 2, 1981. On December 31, 1985, the California Supreme Court affirmed the judgment of guilt but, relying on Carlos v. Superior Court, 35 Cal.3d 131, 197 Cal. Rptr. 79, 672 P.2d 862 (1983), set aside the special circumstance findings and reversed the penalty judgment because the trial court failed to instruct the jury that it had to find that Hamilton had intended to kill the victim in order to find the special circumstances true. People v. Hamilton, 41 Cal.3d 408, 221 Cal. Rptr. 902, 710 P.2d 981 (1985)("Hamilton I"). On July 7, 1986, this Court granted the State's petition for certiorari, vacated the judgment and remanded to the California Supreme Court for reconsideration in light of Rose v. Clark, 478 U.S. 570 (1986). California v. Hamilton, 478 U.S. 1017 (1986). In 1987, a newly constituted California Supreme Court overturned Carlos. People v. Anderson, 43 Cal.3d 1104, 240 Cal. Rptr. 585, 742 P.2d 1306 (1987).

On May 19, 1988, nearly two years after this Court's remand, the California Supreme Court, without discussing Rose v. Clark, adopted its prior decision as to the guilt conviction, reversed its finding of Carlos error by retroactively applying People v. Anderson, sustained the special circumstance findings and affirmed the imposition of death. People v. Hamilton, 45 Cal.3d 351, 247 Cal. Rptr. 31, 753 P.2d 1109 (1988) ("Hamilton II"). Hamilton's claim that the instruction on commutation violated his federal constitutional rights was raised and rejected on direct appeal in the California Supreme Court. Id. at 372-76. Hamilton's direct appeal became final when this Court denied his petition for writ of certiorari on January 23, 1989. Hamilton v. California, 488 U.S. 1047 (1989).

During the pendency of the state court proceedings, Hamilton filed four pro se habeas corpus petitions in the federal district court, one of which (Dist. Ct. No. CV-86-2101-RMB) alleged that he had been shackled at trial in violation of his federal constitutional rights.[1] The district court denied this petition on the merits on December 19, 1987. Hamilton appealed and on April 23, 1989, the United States Court of Appeals for the Ninth Circuit reversed and remanded with instructions that the district court independently review the state court record and consider holding a hearing in order to determine whether Hamilton was unconstitutionally shackled. Hamilton v. Vasquez, 882 F.2d 1469

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1 The other petitions, as well as one subsequently filed pro se petition, were either dismissed or consolidated with Case No. 86-2101.

(9th Cir. 1989). The Ninth Circuit also directed the appointment of counsel.

Respondent Hamilton, through his counsel, filed an amended and consolidated habeas corpus petition in the district court on October 22, 1990. While petitioners describe several habeas corpus petitions filed in state and federal court by Mr. Hamilton, this amended and consolidated habeas corpus petition was considered by the district court to be a "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings.[2] Hamilton's claim regarding the unconstitutionality of the penalty phase instruction on commutation was raised in this petition, which was rejected by the district court on August 23, 1991.

On November 1, 1991, Hamilton's motion to alter or amend the judgment was denied. The district court granted a certificate of probable cause to appeal on November 13, 1991, and Hamilton timely appealed.

On February 3, 1994, the Ninth Circuit Court of Appeals affirmed the district court's denial of habeas relief as to Hamilton's guilt convictions and special circumstance findings. The Court reversed the district court's denial of relief as to

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[2] The Petition contains a lengthy recitation of several pro se habeas petitions filed by Hamilton in the federal district court. Petitioners do not explain why this lengthy discussion is included or how the procedural history of these pro se petitions affected the legitimacy of the Ninth Circuit's opinion. Indeed, on appeal to the Ninth Circuit and on certiorari to this Court, petitioners have conceded that the issues decided by the Ninth Circuit were properly before it in Hamilton's "first" federal petition.

sentence on the ground that the modified and expanded penalty phase instruction on the commutation of a life without possibility of parole sentence violated Hamilton's Eighth and Fourteenth Amendment rights, and remanded the case to the district court with instructions to order new penalty phase proceedings.

An order denying respondent Hamilton's petition for rehearing and suggestion for rehearing en banc was entered on March 22, 1994. On March 31, 1994, the Court of Appeals stayed issuance of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

The State filed in this Court a petition for writ of certiorari on April 19, 1994. Hamilton is concurrently filing with this brief in opposition a cross-petition for certiorari on issues related to the guilt phase of his capital case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. **THE INSTRUCTIONAL ERROR AT ISSUE IS CASE-SPECIFIC**

This Court has long advised counsel practicing before it to refrain from filing petitions for a writ of certiorari as a matter of routine. See, e.g., Sup. Ct. R. 10.1; R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 163-64 (7th ed. 1993) ("The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The function of the Supreme Court is, therefore, to resolve conflicts of opinion of federal questions that have arisen among lower courts, to pass upon questions of wide import

under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts." (quoting Chief Justice Vinson, Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949). In an effort to convince this Court to expend its scarce resources in this matter, petitioners assert that the lower court's decision in this case, if left undisturbed, has broad and dire consequences for scores of other death penalty cases in California and nationwide. Petitioners have misconstrued the reach of the Ninth Circuit's opinion and misinformed this Court about the circumstances of other capital cases. In fact, this case involves the court of appeals examining an instruction unique to this case and perhaps to one other California case.

The jury in Mr. Hamilton's case was given the so-called Briggs Instruction that this Court found constitutional in California v. Ramos, 463 U.S. 992 (1983), which provided as follows:

> You are instructed that under the state constitution a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

The jury was then given an additional lengthy instruction, set out in full in Hamilton v. Vasquez, 17 F.3d 1149, 1161-62 (9th Cir. 1994), Appendix A at 49-50, which went far beyond informing the jury of the possibility that a life without possibility of parole sentence could be commuted.

Petitioners are simply wrong when they state that the modified instruction at issue is identical to the instruction given in several other cases. Of the three other cases petitioners cite for this proposition, only one, People v. McLain, 46 Cal.3d 97, 119-120, 249 Cal. Rptr. 630, 757 P.2d 569 (1988), is virtually identical to Hamilton's instruction. The instructions in the other two cases, People v. Coleman, 46 Cal.3d 749, 780-82, 251 Cal. Rptr. 83, 759 P.2d 1260 (1988)[3] and People v. Whitt, 51 Cal.3d 620, 655-57, 274 Cal. Rptr. 252, 798 P. 2d 849 (1990)[4] do not suffer from the same constitutional infirmities as the instruction given in this case. The only similarity between the instructions in Coleman and Whitt, and the instruction in Hamilton's case is that all three caution the jury not to consider the possibility of commutation in determining sentence. However, the instructions in Coleman and Whitt do not include extensive misleading and inaccurate details of the commutation and parole processes, and do not ask the jury to

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[3] The jury in Coleman was given the standard "Briggs Instruction" followed by the following: "So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant. You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole."

[4] In Whitt, the jury was instructed as follows: "The Governor's commutation power applies to both sentences, to wit, one, death or, two, life without possibility of parole. You are further instructed that it would be a violation of your duty as a juror to consider the possibility of such commutation in determining the appropriate sentence."

assume that the Governor and other officials will perform their duty correctly and responsibly and that the defendant "will not be paroled unless he can safely be released into society."

While petitioners estimate that six or eight other unidentified cases may also be at risk from the holding in this case, its inability to cite correctly to more than one other case renders such an estimate highly questionable. Thus, out of the approximately 380 death judgments in California, one other case may be affected by the lower court's decision.

In any event, the Ninth Circuit's ruling is nothing more than an application of Eighth and Fourteenth Amendment death penalty jurisprudence as expounded upon in such cases as Gregg v. Georgia, 428 U.S. 153 (1976), Lockett v. Ohio, 438 U.S. 586 (1978) and California v. Ramos, 463 U.S. 992 (1983). In applying the principles set forth in these cases to the instruction at issue, the lower court found under the reasonable likelihood test of Boyde v. California, 494 U.S. 370 (1990), that the instruction violated the Eighth and Fourteenth Amendments. While petitioners may disagree with the result of the lower court's application of these cases to the specific instruction given to Hamilton's jury, this is not a basis for the grant of certiorari.

II. THE INSTRUCTION GIVEN IS NOT MORE FAVORABLE THAN THE INSTRUCTION FOUND CONSTITUTIONAL IN CALIFORNIA V. RAMOS

Respondent Hamilton does not dispute that the unmodified Briggs Instruction is constitutionally sound pursuant to California v. Ramos, 463 U.S. 992. Rather, as the Ninth Circuit found, the additional instruction given in this case violated the

Eighth and Fourteenth Amendment principles relied on in Ramos, in that it provided inaccurate and misleading information to the jury and unduly emphasized the commutation and parole processes, thereby implying that a sentence of life without possibility of parole would probably, not possibly, be commuted or modified. The prosecutor exploited the misleading nature of the instruction in his closing argument, while Hamilton was barred by well-established state law from presenting evidence on the improbability of commutation.

This Court approved of the Briggs Instruction in Ramos because it assumed that the trial court's provision of accurate information about the governor's commutation power would not permit the jury to speculate about the likelihood of the defendant's release on parole. California v. Ramos, 463 U.S. at 1004. Here, the jury was not simply informed about the Governor's power to commute a life without possibility of parole sentence. The jury was instructed that if it:

> believe[d] that life imprisonment without the possibility of parole was the proper sentence, [it] must assume that the Governor, the Supreme Court, and those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that Mr. Hamilton will not be paroled unless he can safely be released into society.

Hamilton v. Vasquez, 17 F.3d at 1161, Appendix A at 50. This goes beyond merely informing the jury of a governor's power of commutation. The jury is asked to assume that petitioner's sentence would be commuted, and to then speculate about his parole status. As the Ninth Circuit recognized, "[t]his language

not only created a negative implication that the officials would not properly perform their jobs but it invited the jury to assume that the question of Hamilton's release would automatically come before these officials." Id. at 1161, Appendix A at 48.

The instruction thus incorrectly suggested that if Hamilton were sentenced to life without the possibility of parole, he would most likely have his sentence commuted and ultimately be released. Such an assumption is incorrect. The hurdles standing in the way of parole eligibility were quite formidable, and the possibility that Hamilton would be released on parole were extremely remote. See Hamilton v. Vasquez, 17 F.3d at 1162.

The instruction given in Hamilton's case was also inaccurate and misleading in other respects. The instruction's reference to the fact that a life-sentenced prisoner could be eligible for parole after serving "25 years, less one-third off for good time credit," was misleading insofar it did not adequately explain that this applied to life sentences with the possibility of parole and that Hamilton would be eligible for parole only if the life sentence without possibility of parole was commuted first.[5]

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[5] In addition, this portion of the instruction suggested that the question of commutation would necessarily be considered before a defendant had served the minimum 16 and 2/3 years. The parole authority, now known as the Board of Prison Terms, will review the case of an inmate serving a life without possibility of parole sentence, whose capital crime was committed on or before September 11, 1982, for referral to the governor for commutation or pardon after 12 years have been served, where the inmate has suffered no more than one felony conviction. However, where, as in Hamilton's case, the inmate is a twice-convicted felon, he must apply directly to the governor, and the governor must refer the case to the Board of Prison Terms before the Board can investigate and report on the application. Cal. Penal Code

The likelihood that the jury improperly speculated about Hamilton's eventual parole and voted for death in order to ensure that he not be released was compounded by the prosecutor's closing argument in which he stated that if sentenced to prison, Hamilton would be "conniving and devising ways to manipulate the system and get out." Hamilton v. Vasquez, 17 F.3d at 1162, Appendix A at 54. The prosecutor's comments made sense only in the context of the commutation instruction, which confirmed that it was likely that petitioner could "manipulate the system and get out," despite a verdict of life without possibility of parole. Furthermore, unlike in Ramos, 463 U.S. 1012, the instruction in this case was given undue emphasis. The sheer length of the instruction magnified the importance of the Governor's powers. Moreover, the instruction was delivered not once but twice to the jury; the second occasion was in response to an unrelated question from the jury on the third day of deliberations.

The instruction thus had the opposite effect from what this Court concluded regarding the unadorned instruction: it invited the jury to "predict . . . what some future Governor [or parole authority] might do" instead of "what the defendant himself might do if released into society." Ramos, 463 U.S. at 1005.

Ramos upheld the Briggs Instruction in part because it assumed that the instruction "gives the jury accurate information of which both the defendant and his counsel are aware, and it

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§§ 4801-4802, 4812-4813; 15 Cal. Code of Regulations § 2816-2817.

does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." California v. Ramos, 463 U.S. at 1004. Not only was the instruction in Hamilton's case inaccurate and misleading, Hamilton was precluded under then-existing state law from providing any evidence to mitigate the adverse inferences which the jury may have drawn from the instruction. At the time of Hamilton's trial, California state law "prevented defense counsel from showing the actual likelihood of a person ever being paroled if he were sentenced to life imprisonment." Hamilton v. Vasquez, 17 F.3d at 1162, Appendix A at 52 (citing People v. Morse, 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33 (1964)). Morse specifically overruled prior precedent which permitted the introduction of evidence and argument regarding the possibility that parole would be granted to a defendant serving a life sentence. As a result, the jury in Hamilton's case was permitted to learn that the Governor had the power to commute a life sentence, but well-settled California law precluded any attempt to introduce evidence to show that, as a practical matter, commutation was extremely unlikely.

Thus, contrary to petitioners' assertion, the Ninth Circuit's holding in this case did not violate this Court's holding in Ramos, but is dictated by it. The instruction given in Hamilton's case, unlike the one in Ramos, was inaccurate and misleading, and together with the prosecutor's improper argument and the preclusion of defense evidence on the remote possibility

that a life without possibility of parole sentence would be commuted, "divert[ed] the jury from undertaking the kind of individualized sentencing determination that . . . is 'a constitutionally indispensable part of the process of inflicting the penalty of death.'" Ramos, 463 U.S. at 1005 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

III. THE LOWER COURT APPLIED CORRECTLY BOYDE V. CALIFORNIA

Petitioners argue that the Ninth Circuit failed to apply Boyde v. California, 494 U.S. 370 (1990) to determine whether the instruction was applied in an unconstitutional manner. Petitioners are wrong. The Ninth Circuit clearly applied Boyde, recognizing that Boyde "requires us to look at the instructions as a whole to determine whether there is a reasonable, objective likelihood that the jury was misled," and finding that "there is a reasonable likelihood that the jury impermissibly applied the modified Briggs instruction." Hamilton v. Vasquez, 17 F.3d at 1163, 1164, Appendix A at 58-61.

While the jury was instructed not to consider the possibility of commutation, as the Ninth Circuit recognized, this admonition could not have cured the error of the instruction: "Here, where the trial court told the jury not to consider what it had just been instructed were relevant considerations, the jury must have been misled." Id. at 1163, Appendix A at 58. As the dissent from the state court's opinion recognized, "[t]he Governor's power was given too much importance and emphasis to allow further instructions to eliminate the prejudice." Hamilton

II, 45 Cal.3d at 382 (Broussard, J., dissenting). Moreover, the instruction was intrinsically contradictory in that it told the jury to assume that those in charge of the parole system will act correctly and responsibly, but at the same time not to consider or speculate whether commutation or parole would ever occur. Even if the cautionary instruction was unambiguous, this is one of the rare instances where a cautionary instruction could not cure the harm. See Bruton v. United States, 391 U.S. 123, 129 (1968). Furthermore, the prosecutor undid any effect the cautionary instruction might have had by asking the jury to consider that Hamilton would likely be released from prison. See Richardson v. Marsh, 481 U.S. 200, 211 (1987).

Petitioners mislead this Court when they argue that there is no reason to believe that the jury did not follow the trial court's admonition not to consider the likelihood that a life without possibility would be commuted or modified. A sworn declaration from the jury foreman, presented to both the district court and court of appeals without objection, clearly states that during its penalty phase deliberations the jury discussed the governor's commutation power and that if given a life without parole sentence, Hamilton would likely be paroled.[6] As this declaration makes clear, respondent's jury did not follow the trial court's admonition and did focus on the Governor's

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[6] The declaration of jury foreman, Orlow Garrett, was filed with the district court in support of Hamilton's motion to alter or amend the judgment and/or for new evidentiary hearing. Ninth Circuit Court of Appeals Excerpts of Record, pp. 000302 A-C.

commutation power in determining sentence. The jury foreman declared that during penalty phase deliberations the jury discussed "the likelihood that a life without possibility of parole sentence would be commuted" and discussed their fear that if they voted for life without the possibility of parole, "Hamilton's sentence would be commuted and he would be released from prison." Thus, petitioners' claims about the curative nature of the instruction must be rejected. It is evident that the jury voted for death not based on the a determination of the appropriate sentence under the circumstances of Hamilton's case, but because they were under the mistaken impression that if given life without the possibility of parole, Hamilton would most likely be paroled.

Petitioners criticize the Ninth Circuit's opinion for failing to engage in a harmless error analysis pursuant to Brecht v. Abrahamson, 507 U.S. __, 113 S.Ct 1710, 123 L.Ed.353 (1993), in addition to the analysis under Boyde. First, it should be noted that petitioners failed in their briefing in the district court or in the court of appeals to argue that any error would be harmless or sought to have the court apply Brecht or any harmless error standard to the issue. Nor, once the court of appeals found error, did respondent seek on rehearing for an application of harmless error. Petitioners should therefore be precluded from raising this claim for the first time before this Court. See Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

In any event, assuming that Brecht is applicable to this

case, the clear implication of the Ninth Circuit's analysis under Boyde is that the error was not harmless, but had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 113 S.Ct at ___. The Ninth Circuit's finding of prejudice is fully supported by the record and the sworn juror declaration. The defense called seven witnesses at the penalty phase, and the jury deliberated for three days. As the Ninth Circuit recognized, "[t]he lengthy deliberation, coupled with the mitigating evidence presented, supports the conclusion that the detailed instruction on the possibility of commutation and parole prevented the jury from properly considering Hamilton's penalty." Hamilton v. Vasquez, 17 F.3d at 1163, Appendix A at 56.

IV. THE LOWER COURT'S RULING DOES NOT CREATE A NEW RULE

Petitioners argue that the Ninth Circuit's determination that the penalty phase instruction on commutation violated petitioner's Eighth and Fourteenth Amendment rights to an individualized and reliable sentencing determination created a new rule which cannot be applied retroactively to Hamilton's case pursuant to Teague v. Lane, 489 U.S. 288 (1989).

Petitioners never raised Teague below. Petitioners seek to excuse their failure to argue Teague in the district court or the Ninth Circuit because the so-called "new rule arose when the majority made an unexpected departure from Ramos and Boyde." Petition at 47 n.5. The fact that petitioners did not believe they would lose on the issue does not excuse their failure to raise a non-retroactivity defense below.

The Teague bar to the retroactive application of new rules is not jurisdictional. See Collins v. Youngblood, 497 U.S. 37, 41 (1990). Thus, the state can waive the Teague bar by not raising it below. A federal court "may, but need not, decline to apply Teague if the State does not argue it." Caspari v. Bohlen, 127 L.Ed.2d 236, 245 (1994) (citing Schiro v. Farley, 127 L.Ed.2d 47 (1994)).

It is clear, however, that the Ninth Circuit's decision in this case did not create a new rule. A new rule is one which "breaks new ground or imposes a new obligation on the States or the Federal Government." Teague v. Lane, 498 U.S. at 301. "A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id.[7]

While the instruction given in Hamilton's trial is distinguishable from the two-sentence instruction given in Ramos, the Ninth Circuit's opinion is a straightforward application of Ramos and this Court's seminal rulings on the constitutionality of capital punishment procedures.[8] It applies Gregg v.

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[7] Petitioners incorrectly calculate the date of finality by using the time of trial, 1981. In fact the date of finality is January 23, 1989, the date this Court denied Hamilton's petition for certiorari. Hamilton v. California, 488 U.S. 1047 (1989). See Stringer v. Black, 503 U.S. __, 112 S.Ct. 1130, 1134, 117 L.Ed.2d 367, 376 (1992).

[8] One of the principles underlying the Teague doctrine is to validate "reasonable, good faith interpretations of existing precedents made by state courts . . . ." Butler v. McKellar, 494 U.S. 407, 414 (1990). Thus, where an instruction had been uniformly applied for many years, "such an institutionalized state practice over a period of years is strong evidence of the

Georgia, 428 U.S. 153 (1976), Lockett v. Ohio, 438 U.S. 586 (1978) and California v. Ramos, 463 U.S. 992 (1983) to the instruction at issue. As the Ninth Circuit stated, it "examine[d] the challenged instruction in light of these exacting standards for fair and informed jury deliberation in death penalty cases." Hamilton v. Vasquez, 17 F.3d at 1160. The Ninth Circuit found that because the instruction was inaccurate and misleading and that respondent was precluded from presenting accurate information regarding the unlikelihood that he would ever be released if sentenced to life without possibility of parole, respondent's Eighth and Fourteenth Amendment rights were violated.

This Court recognized in Gregg v. Georgia that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die . . . ." Where, as here, the jury's view of the sentencing alternatives is distorted a needless risk is introduced that the jury will impose death based on inaccurate and misleading information in violation of the Eighth Amendment. Furthermore, the bar to defense evidence on commutation violated the

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reasonableness of the interpretations given existing precedent by state courts." Gilmore v. Taylor, 124 L.Ed.2d 306, 320 n. 3 (1993). In that regard, the unmodified Briggs Instruction was no longer used after it was found to violate the state constitution in People v. Ramos, 37 Cal.3d 136, 207 Cal. Rptr. 800, 689 P.2d 430 (1984), and the modified version of the instruction given here, while found by the California Supreme Court to be non-prejudicial in view of the cautionary language, was held "to mislead and to invite speculation on irrelevant and improper matters." People v. Hamilton, 45 Cal.3d at 375.

"elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'." Skipper v. South Carolina, 476 U.S. at 5 n.1 (quoting Gardner v. Florida, 430 U.S. 349, 362 (1979).

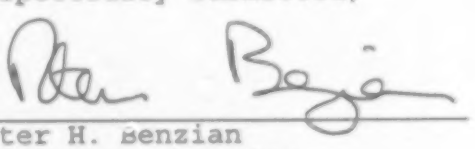
The Ninth Circuit's holding in this case is by no means "irreconcilable" with this Court's precedents. See Graham v. Collins, 113 S.Ct. 892, 898-902 (1993). On the contrary, it is compelled by them.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

DATED this 17th day of May, 1994.

Respectfully submitted,



Peter H. Benzian
of Latham & Watkins

Attorneys for Respondent
Bernard Lee Hamilton

AFFIDAVIT OF SERVICE BY MAIL

I, the undersigned, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 701 B Street, Suite 2100, San Diego, California 92101.

I have served the within **BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** as follows to the parties indicated below:

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The Hon. Rudi M. Brewster
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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 17th day of May, 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California on May 17, 1994.

Christine E. Cummins
CHRISTINE E. CUMMINS

Subscribed and sworn to before me
this 17th day of May, 1994.

Notary Public in and for said
County and State

CANDACE L. CHARLET
COMM.#1004991
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
MY COMMISSION EXPIRES
SEPTEMBER 12, 1997

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 93-1652

ARTHUR CALDERON, Warden (Petitioner) vs. BERNARD LEE HAMILTON (Respondent)

The Clerk will enter my appearance as Counsel of Record for the Criminal Justice Legal Foundation

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☐ Respondent(s) ☒ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Kent S. Scheidegger

(Type or print) Name Kent S. Scheidegger

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Criminal Justice Legal Foundation

Address Post Office Box 1199

City & State Sacramento, California Zip 95812-9950

Phone (916) 446-0345

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

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